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82-822
No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

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Attorney for Petitioners, the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission, the Sebring Utilities Commission, and the Cities of Gainesville, Homestead, Key West, Kissimmee, St. Cloud, Starke, and Tallahassee, Florida.

DI CESARE - Printing — 331-4101 — Washington, D.C. 20006

QUESTION PRESENTED

Whether a Court of Appeals errs in refusing a motion to vacate its judgment as moot prior to the termination of the judicial review process despite the fact that the judgment has subsequently become unreviewable due to a postjudgment settlement occurring prior to the end of the period in which a Writ of *Certiorari* could otherwise have been sought from this Court, and despite the procedural requirements emphasized by this Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979).

Counsel notes that this case presents no novel question. However, *United States v. Munsingwear, Inc., supra,* plainly sets forth the duty of an appellate court to grant a request to vacate its judgment, where a case becomes moot before the review process is complete. The failure of the Former Fifth Circuit to comply with applicable precedent of this Court is so clear that counsel respectfully suggests that the grant of *certiorari* and summary reversal is appropriate in order to protect the integrity of the judicial process.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Former Fifth Circuit were:

Florida Power & Light Company[1]
Federal Energy Regulatory Commission
The Fort Pierce Utilities Authority
The Lake Worth Utilities Authority
The New Smyrna Beach Utilities Commission
The Sebring Utilities Commission
City of Gainesville, Florida
City of Homestead, Florida
City of Key West, Florida
City of Kissimmee, Florida
City of St. Cloud, Florida
City of Starke, Florida
City of Tallahassee, Florida

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[1]Florida Power & Light Company has no parent companies or affiliates. Its subsidiaries are:

Fuel Supply Service, Inc.
Land Resources Investment Company
W. Flagler Investment Corporation

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OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

Petitioners *Florida Cities*[2] respectfully pray that a Writ of *Certiorari* issue to review the order of the United States Court of Appeals for the Former Fifth Circuit entered in this proceeding on August 16, 1982.

OPINIONS BELOW

The unreported order of the Court of Appeals denying Petitioners' Motion to Vacate as Moot, review of which is sought, is captioned *Florida Power and Light Company v. Federal Energy Regulatory Commission*, No. 80-5259 (5th Cir. August 16, 1982), and is attached as Appendix S, p. A-87. The order of the Court of Appeals denying applications

[2]Florida Cities include the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission, the Sebring Utilities Commission, and the Cities of Gainesville, Homestead, Key West, Kissimmee, St. Cloud, Starke, and Tallahassee, Florida, all of whom were intervenors before the Court of Appeals, intervening either as of right or pursuant to the Order of the Court of Appeals of May 29, 1980. [App. C, p. A-14]

for rehearing and a Suggestion for Rehearing *En Banc*, filed January 22, 1982, is unreported, and is attached as Appendix H, p. A-46. The opinion of the Court of Appeals filed November 6, 1981 is reported at 660 F.2d 668, and is attached as Appendix G, p. A-22.

The orders of the Federal Energy Regulatory Commission reviewed by the Former Fifth Circuit are captioned *Florida Power & Light Co.*, 9 FERC ¶ _____, Docket No. ER78-19, *et al.* (December 21, 1979; "Orders Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules"), *rehearing denied*, 10 FERC ¶61,108 (February 6, 1980), App. A, p. A-1 and App. B, p. A-10. The order of the Federal Energy Regulatory Commission whose review the Former Fifth Circuit held in abeyance pending the outcome of Former Fifth Circuit Docket No. 80-5259 is *Florida Power & Light Company*, 12 FERC ¶61,055, Docket Nos. ER80-411, *et al.* (July 22, 1980; "Order Accepting in Part For Filing and Rejecting In Part Supplements to Service Agreements"), App. D, p. A-15.

JURISDICTION

The order of the Court of Appeals denying Petitioners' Motion to Vacate as Moot was filed August 16, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is 28 U.S.C. §2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In this case, the Former Fifth Circuit denied a motion to vacate its judgment as moot after the parties in interest had settled and after the Federal Energy Regulatory Commission ("FERC" or "Commission") had issued an order approving settlement and vacating the Commission orders on which the Former Fifth Circuit's judgment had been based. Petitioners seek *certiorari* to correct this plain error of law. The essential facts follow:

In proceedings before the Federal Energy Regulatory Commission, the FERC staff and certain intervening Florida Cities, petitioners here, alleged that the refusal of Florida Power and Light Company ("FPL") to transmit electric power for smaller municipal electric systems violated the Federal Power Act and the antitrust laws. Pursuant to Section 205(c) of the Act, 16 U.S.C. §824d(c), and §35.2(b) of its regulations, 18 C.F.R. §35.2(b) the Commission ordered FPL to file a transmission tariff. "Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules," *Florida Power & Light Company*, Docket Nos. ER78-19, *et al.* (December 21, 1979), *rehearing denied* 10 FERC ¶61,108 (1980) [App. A, p. A-1 and App. B, p. A-10] The Company sought review in the Former Fifth Circuit Court of Appeals pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b), arguing that the Commission had acted beyond its authority under the Federal Power Act. With certain exceptions, the Court of Appeals accepted FPL's position. *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668 (5th Cir. 1981).

Rehearing applications by the Commission and Florida Cities and a Suggestion for Rehearing *En Banc* by Florida

Cities were denied on January 22, 1982. [App. H., p. A-46][3] On April 23, 1982, an Order Extending Time to File Petition for Writ of *Certiorari* was granted, extending the period to June 21, 1982 [App. N, p. A-74].

In March, 1982, FPL and Florida Cities entered into comprehensive antitrust settlements, covering the *Florida Power & Light Co. v. FERC* transmission case, *supra*, 660 F.2d 668, which is the subject of this appeal, as well as cases before other fora. In their settlement, relying on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the parties agreed to seek dismissal of pending cases as moot. Specifically, the settlement states at p. 16 [App. J at p. A-60]:

> Florida Cities and FPL shall cooperate in attempting to secure the consent of the FERC and any other party in order to vacate the judgment in *Florida Power & Light Company v. FERC*, 660 F.2d 668 (5th Cir. 1981), and the FERC order that was the subject of that judgment on the grounds that the controversy among the parties to those proceedings with respect to the filing of a transmission tariff has been mooted.

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[3]In a companion case, *Florida Power & Light Company v. FERC*, No. 80-5922, FPL appealed from the Commission's "Order Accepting in Part for Filing and Rejecting In Part Supplements To Service Agreement," *Florida Power & Light Company*, 12 FERC ¶61,055 Docket Nos. ER80-411, *et al.* (July 22, 1980) [App. D., p. A-15]. The intervention of Florida Cities was sought and granted in the same manner as in No. 80-5259 [App. E, p. A-18]. This case was held in abeyance pending the outcome of Docket No. 80-5259. *Florida Power & Light Company v. Federal Energy Regulatory Commission*, No. 80-5922 (5th Cir. February 9, 1981)[App. F, p.A-19]. On June 28, 1982, the Eleventh Circuit granted FPL's motion to dismiss No. 80-5922 in light of the Commission's action vacating the Commission orders, which were the basis of appeal in No. 80-5259. [App. Q, p. A-84]

Excerpts from the settlement are Appendix J, p. A-55.[4]

On June 10, 1982, FPL filed a separate settlement with the FERC. Under that settlement, the FERC staff agreed to withdraw its request that FPL file a transmission tariff and to withdraw allegations of anticompetitive activity against the Company, and FPL agreed to support vacation of the judgment of the Fifth Circuit. *Florida Power & Light Company,* 19 FERC ¶ 61,269 (June 17, 1982) [App. O,

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[4]In addition to the litigation that was at issue before the FERC and led to the appeal in this case, FPL and various Florida Cities were also in litigation before the Nuclear Regulatory Commission and the United States District Court for the Southern District of Florida. As to those cases, the settlement states at pp. 15-16 [App. J at pp. A-59-A-60]:

> ...FPL and those Cities which are parties to *Lake Worth Utilities Authority, et al. v. FPL,* S.D. Fla. No. 79-5101-Civ-JLK, shall enter into a stipulation, in the form attached hereto as Exhibit A, dismissing such litigation with prejudice and requesting that the Court vacate as moot its "Order Denying Motions for Summary Judgement on Plaintiff's Gas Claim and Granting Defendant's Summary Judgment Motion on Plaintiff's Nuclear Access Claim," dated October 9, 1981...
>
> . . . (5) a motion shall be filed, in the form attached hereto as Exhibit E, in which ... (ii) Florida Cities and FPL request that those proceedings be terminated without further litigation or other action and that the "Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits," issued by the Atomic Safety and Licensing Board in NRC Docket No. 50-389A on December 11, 1981, be vacated as moot.

As we set forth at p. 8, n. 8, *infra,* both the District Court and Nuclear Regulatory Commission ("NRC") granted motions to vacate their respective orders.

p. A-76]. These settlements resolved the underlying controversy among the parties to the appellate proceedings below. Florida Cities supported this second settlement.[5]

On June 17, 1982, the Federal Energy Regulatory Commission approved the settlement, thus binding the Commission. *Id.*[6] On the same day, FPL and the Florida Cities moved to have the Former Fifth Circuit vacate as moot its decision in *Florida Power & Light Co. v. FERC, supra,* 660 F.2d 668. The Commission filed a statement with the Former Fifth Circuit confirming that the underlying controversy in that case was moot. [App. P, p. A-82][7]

On August 16, 1982, the Former Fifth Circuit denied the Motion to Vacate as Moot, without opinion or explanation. [App. S, p. A-87]

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[5]A separate settlement before FERC was necessary to terminate antitrust issues before the Commission because the FERC orders which were the subject of the appeal in *Florida Power & Light v. FERC, supra,* had been interlocutory and because the staff was a separate party to the Commission proceedings.

[6]As we state above, on April 22, 1982, Florida Cities, supported by FPL, had asked this Court to grant an extension of time for the filing of a Petition for Writ of *Certiorari.* The purpose of the application was to permit time for the FERC to review the settlement and, if the settlement were approved, thereby mooting the case, to permit the parties to file a motion to vacate with the Former Fifth Circuit. *See,* "Application for An Extension of Time to File a Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eleventh (Former Fifth) Circuit," pp. 2-3. [App. M at pp. A-70 - A-71] On April 23, 1982, Justice Powell granted the extension "to and including June 21, 1982." [App. N, p. A-74]

[7]The Potomac Electric Power Company sought leave to intervene late in order to oppose the Motion to Vacate the Former Fifth Circuit decision. This request was denied on August 16, 1982. [App. R, p. A-85]

REASONS FOR GRANTING REVIEW

The action of the Former Fifth Circuit in refusing to vacate its judgment in *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), as moot, is directly contrary to this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The granting of *certiorari* in the present case is essential to meet the concern of the *Munsingwear* court "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." 340 U.S. at 41.

The opinions of this Court leave no doubt that the settlement of a case will, via mootness, serve to bar the further appellate review of the merits of the case that might have otherwise been available. *Black v. Amen*, 355 U.S. 600 (1958); *Verret v. Oil Transport Co., Inc.*, 365 U.S. 768 (1961); *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959); *Hammond Clock Co. v. Schiff*, 293 U.S. 529, 530 (1934); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., Inc.*, 638 F.2d 7, 8 (2nd Cir. 1980).

The established practice in dealing with a civil case that has become moot after decision, but before the exhaustion of the appellate process, is to vacate the judgment below and remand with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. at 39; *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94(1979); *NOW, Inc. v. Idaho*, 51 U.S.L.W. 3251 (U.S. October 5, 1982).

The same practice has been held applicable to administrative orders where the possibility of appellate review, or review on rehearing, is barred by intervening mootness. *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961); *Stewart v. Southern Railway Co.*, 315 U.S. 283, *vacated as moot* 315 U.S. 784 (1942); *Tennessee Gas Pipeline Co. v. Federal Power*

Commission, 606 F.2d 1373, 1382 (D.C. Cir. 1979). As this Court states in *Munsingwear*, 340 U.S. at 39-40:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. (footnote omitted)[8]

And, as this Court states in *Mechling, supra*, 368 U.S. at 329:

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[8]On motions of the parties, both the Nuclear Regulatory Commission and District Court have applied the *Munsingwear* doctrine. See p. 5, n. 4, *supra.*, "Memorandum and Order (Concerning Motions to Dismiss, Terminate and Vacate)," *Florida Power & Light Company* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A, Atomic Safety & Licensing Board, 15 NRC 639, 642 (1982) [App. L at p. A-67]:

> FPL and Cities have requested that our Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits, dated December 11, 1981 (LBP-81-58, 14 NRC 1167) should be vacated. They argue by analogy to established federal practice that when an appeal becomes moot it is appropriate to vacate the trial court's decision. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).
>
> We accept this argument as valid. Moreover, our decision of December 11, 1981, was tentative, being left open by us for further objection by the parties. Given the preliminary nature of that opinion and the agreement of the parties not

> We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders, and we adopt its procedure here. The District Court should have vacated the order which it declined to review. (footnote omitted)

Since the time to petition this Court for *certiorari* had not run as of the date of the filing in the Former Fifth Circuit of the Motion to Vacate as Moot, the *Munsingwear* doctrine is fully applicable. When FPL and the Florida Cities filed their joint motion to vacate, the Court had no choice other than to vacate its judgment.[9] The granting of *certiorari* and

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> to contest it, that opinion ought to be vacated. It is our duty to adjudicate disputes and not to stand in the way of settlements by refusing a reasonable request to vacate our order.

"Amended Order of Dismissal," *Lake Worth Utilities Authority, et al. v. Florida Power & Light Company*, S.D. Fla., Case No. 79-5101-Civ-JLK, March 23, 1982 [App. K at p. A-63]:

> FURTHER ORDERED AND ADJUDGED that the Court's October 9, 1981 Order Denying Motions for Summary Judgment on Plaintiff's Gas Claim And Granting Defendant's Summary Judgment Motion on Plaintiff's Nuclear Access Claim be, and hereby is, vacated as moot.

[9]Even if (contrary to *Munsingwear, supra)* the Court of Appeals had some area of discretion, no reason appears for the denial of the parties' motion, and there was none. In contrast to its action in this case, in *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 216 (5th Cir. 1975), the Fifth Circuit withdrew its own previous decision and vacated its previous judgment due to mootness, citing *Munsingwear. Lebus v. Seafarers' International Union*, 398 F.2d 281, 283 (5th Cir. 1968) also attests to the Fifth Circuit's adherence to *Munsingwear. See, Troy State University v. Dickey*, 402 F.2d 515, 516-517 (5th Cir. 1968); *St. Louis-San Francsico Railway Co. v. Railroad Yardmasters*, 347 F.2d 983, 984 (5th Cir. 1965). *Accord, Superior Oil Co. v. Hickel*, 421 F.2d 1089 (D.C. Cir. 1969); *Schwartz v. Olympic, Inc.*, 174 F.2d 830 (3rd Cir. 1949); *Cold Metal Process Co. v. Carnegie-Illinois Steel Corp.*, 115 F.2d 33 (3d Cir. 1940). The Court of Appeals' action here is unexplained and inexplicable.

reversal of the decision below will avoid binding parties by a case where review was prevented as a result of settlement, *Munsingwear, supra,* thus furthering the Commission's long-standing policy to support settlement of litigation. It would enforce compliance with this Court's decisions, *Vermont Yankee Nuclear Power Corporation v. NRDC,* 435 U.S. 519, 525 (1978).

As the Fifth Circuit itself has stated:

> . . . Commission approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of . . . evermore complicated problems . . . . Consequently settlements should be encouraged, not discouraged. (footnotes omitted)

Texas Eastern Transmission Corp. v. FPC, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied sub nom. Manufacturer's Light & Heat Co. v. Texas Eastern Transmission Corp.,* 375 U.S. 941 (1963). *Accord, e.g., Mitchell Energy Corp. v. FPC,* 519 F.2d 36, 40 (5th Cir. 1975); *Amoco Production Company v. FPC,* 465 F.2d 1350, 1354-1355 (10th Cir. 1972); *City of Chicago v. FPC,* 385 F.2d 629, 640 (D.C. Cir. 1967), *cert. denied sub nom. Public Service Commission v. FPC,* 390 U.S. 945 (1968).

Here, part of the bargain the parties reached was to seek vacation of court and agency decisions still subject to review. Settlements can only be discouraged if parties know that by entering into them, they will become bound by all interlocutory decisions.

CONCLUSION

For the foregoing reasons, the Writ of *Certiorari* should be granted, the judgment of the Court of Appeals in No. 80-5259 should be vacated, and the case should be remanded to the Court of Appeals with directions to dismiss the case as moot. Petitioners suggest that the relief requested may be granted summarily.

Respectfully submitted,

Robert A. Jablon
Attorney for Petitioners, the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission, the Sebring Utilities Commission, and the Cities of Gainesville, Homestead, Key West, Kissimmee, St. Cloud, Starke, and Tallahassee, Florida

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, Matthew Holden, Jr.
and George R. Hall.

Florida Power & Light Company) Docket Nos. ER78-19, *et al.*

ORDER DIRECTING THE SUBMISSION OF A TRANSMISSION TARIFF IN SUBSTITUTION FOR INDIVIDUAL RATE SCHEDULE

(Issued December 21, 1979)

On June 6, 1978, the Staff moved to compel Florida Power & Light Company (FP&L) to file amended schedules governing the transmission services provided to the Florida municipal utilities of Homestead (Docket No. ER78-325) and Fort Pierce (Docket No. ER78-376). Staff requested that each schedule be modified to include a company policy, enunciated by an FP&L executive, regarding the availability of transmission services such as those provided to Homestead and Fort Pierce. Staff further requested that FP&L be required to include this statement of policy in all future transmission service agreements. By order of June 15, 1978, we consolidated the current FP&L power rate proceeding, Docket No. ER78-19, with Docket Nos. ER78-325 and ER78-376 for the purpose of a hearing. In that order we deferred action on the Staff motion to afford additional time to consider the requested relief. In the interim, FP&L has filed 16 additional transmission service schedules which have been accepted for filing, suspended and consolidated into Docket No. ER78-19.[1] We shall now act on the Staff motion.

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[1]*See* Attachment A for identification of the customers served under rates filed in other dockets. The types of transmission services provided are generally described in *Florida Power & Light Co.*, Opinion No. 57 (August 3, 1979) (mimeo at 32-33), *rehearing denied*, Opinion No. 57-A (October 4, 1979).

The policy statement to which Staff refers is recited in the prepared testimony of FP&L vice president Ernest Bivans, filed in Docket No. ER77-175 as rebuttal to certain Staff assertions that FP&L had unduly discriminated among potential users of its transmission services.[2] Mr. Bivans listed four criteria on which FP&L conditions the availability of transmission services:

Q. Does the failure of FP&L to file a generally applicable transmission tariff reflect any intention by FP&L to preclude neighboring utilities from obtaining transmission service?

A. Most emphatically not. We are willing to provide transmission service when:

1. The specific potential seller and buyer are contractually identified;

2. The magnitude, time and duration of the transaction are specified prior to the commencement of the transmission;

3. It can be determined that the transmission capacity will be available for the term of the contract; and

4. The rate for such service is sufficient to compensate FP&L for its costs.[3]

Staff's June 6 motion submits that the Bivans testimony constitutes an FP&L practice or regulation which affects or relates to the Company's transmission rate schedules. Relying on Section 205(c) of the Federal Power Act and Section 35.1(a) of the Regulations, Staff requests that the Commission order FP&L to include these availability criteria in the transmission service agreements.

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[2]Docket No. ER77-175, which is now pending on exceptions to an initial decision, was not consolidated with the proceedings listed in Attachment A. It concerns another type of transmission service provided to New Smyrna under a lower rate, based on an earlier test year.

[3]Docket No. ER77-175, transcript page 118.

On June 12, 1978, FP&L answered in opposition to this motion claiming that there is no reason to believe that its proposed transmission agreements fail to achieve the policy in Mr. Bivans' statement, nor is such a statement a necessary or appropriate part of an agreement to provide transmission service for a particular customer. Citing *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), FP&L states that the Commission has no authority to compel a public utility to provide transmission services. FP&L asserts that if the Commission requires the inclusion of a policy statement as requested by Staff, it would constitute a "back door" attempt to compel it to file a general wheeling tariff.

Section 205(c) is a broad mandate that jurisdictional electric utilities file with the Commission:

> ...schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which is any manner affect or relate to such rates, charges, classifications, and services.

Section 35.1(a) of the Commission's Regulations, which implements Section 205(c), requires utilities to file full and complete rate schedules, a term defined in Section 35.2(b) as follows:

> The term "rate schedule" as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with this service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates and charges. This statement shall be in writing and may take the form of a contractual document, purchase, or sale agreement, lease of facilities, tariff or other writing. Any oral agreement or understanding shall be reduced to writing and made a part thereof.

The Federal Power Commission had occasion to define the term "practice," which is also found in Section 4(c) of the Natural Gas Act.[4] In *Michagan Wisconsin Pipeline Company*, 34 FPC 621, 626 (1965), the Commission held that a "practice" includes company policy statements:

> ...A consistent and predictable course of conduct of the supplier that affects its financial relationship with the consumer in our opinion is a 'practice' subject to the filing requirements. The filing of such a procedure as part of the pipeline tariff is not only consistent with but furthers the purpose underlying the filing and posting requirements of rate schedules. *A pipeline tariff announces not only what the pipeline has done in the past but the terms and conditions upon which it would, as a matter of policy, provide service to new customers meeting the tariff's eligibility requirements. Even if the tariff were viewed merely as an informational description of existing service obligations, this description of the pipeline's actual practice would be of real benefit to both existing and potential customers,* for it would show them, as well as the Commission, the terms by which gas would be sold upon completion of Section 7 proceedings.
> (Emphasis supplied)

The Bivans testimony is an unqualified statement of transmission service availability, subject to four objective criteria. It contains no implicit conditions and is not, on its face, contingent on the outcome of litigation in Docket No. ER77-175.

In *Florida Power & Light Co.*, Opinion No. 57 (August 3, 1979), we found that certain proposed availability restrictions in FP&L's wholesale power tariff had serious anticompetitive effects. In the course of our analysis, we determined that FP&L possesses monopoly power over wholesale and retail sales in a relevant geographic market comprising much of peninsular Florida. We also found that the availability of interchange

[4] 15 U.S.C. 717c(c). Provisions of the Natural Gas Act are to be read *in pari materia* with analogous provisions of the Federal Power Act. *FPC* v. *Sierra Pacific Company*, 350 U.S. 348, 353 (1956).

transmission services, at issue here, did not significantly diminish that power; however, these services do have a bearing on competitive relationships within the relevant markets. We believe that the FP&L policy statement provides useful information to potential transmission customers on the availability of interchange transmission services and that its inclusion in FP&L's rate schedules would have definite procompetitive effects. Specificity should help eliminate the serious problems which faced utilities, such as Homestead and Fort Pierce, when FP&L narrowly construed its wholesale power rate schedule to improperly avoid providing service. *See,* Opinion No. 57, *supra* (mimeo at 26-32).

FP&L does not contest the relevance of its four availability criteria to the interchange transmission services it offers. Mr. Bivans' statement of company policy was presented as a defense to certain antitrust allegations made by Staff and it was undoubtedly intended that the Commission would rely on this statment in reaching a decision in Docket No. ER77-175.[5] Under the circumstances, it would be unreasonable for FP&L to have anticipated anything other than that these availability criteria would be given publication and effect and the appropriate place for the criteria is clearly in rate schedules for services to which they apply. Therefore, although we do not believe that rate schedules need contain every statement made by a utility, the circumstances of this case dictate that the four transmission availability criteria be included.

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[5]FP&L recently advanced this wheeling policy and its offers of interchange transmission services as reasons for modifying the Commission decision in *Florida Power & Light Co.*, Opinion No. 57, *supra*, n. 2. *See,* Opinion No. 57-A, *supra* n. 2 (mimeo at 3). It is of special importance that existing and prospective customers be aware of those FP&L transmission services available to wheel alternative sources of wholesale power and energy. FP&L has been found to have blocked those sources by means of an illegal division of the wholesale power market. *See, Gainesville Utilities Department* v. *Florida Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978), *cert. denied,* ____ U.S. ____, 99 S. Ct. 454 (1978).

We must make it clear that we are not prejudging the justness and reasonableness of the four criteria in this order. Rather, we simply require that FP&L include in its rate schedules its currently effective policy on the availability of wheeling. The justness and reasonableness of this policy is a subject of contention in Docket No. ER77-175, and any Commission judgment on this question will be made in our final order in that docket. Nonetheless, unless and until the Commission permits or orders the Company to change this policy in Docket No. ER77-175 or some other proceeding, the four criteria constitute effective company policy and existing and prospective customers are entitled to be advised of that policy and to rely on it. *Michigan Wisconsin Pipeline Co., supra,* 34 FPC at 626.

FP&L's citation to *Otter Tail Power Company* v. *United States, supra,* is unavailing. Our action here does not in any way expand the transmission service obligation which FP&L has voluntarily undertaken through its enunciated policy. This order simply requires that FP&L include its own stated terms and conditions of transmission service in its filed rate schedules as expressly required by Section 205(c). The Court in *Otter Tail* noted that these terms and conditions governing transmission services are subject to our oversight.[6] The only effect of this order on FP&L's obligation to provide transmission services is that, once having promulgated a company policy on availability in a record statement, it may not subsequently alter the transmission availability criteria without first obtaining a determination from this Commission that to do so would be just and reasonable under Sections 205 and 206.

As noted earlier, FP&L has submitted for filing an average of one transmission rate per month over the last 19 months. Whatever the reason may be for serial filings regarding each customer, and we perceive none in this case, there are several compelling reasons why FP&L should employ a single comprehensive tariff instead. Not even FP&L would argue that each filing is a *de novo* application, for the rates do not vary

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[6] 410 U.S. at 376-77.

according to the specified transactions and the supporting testimony and exhibits are simply rolled over from one filing to the next. Each filing has been suspended for one day, made effective subject to refund, and consolidated with FP&L's wholesale rate proceeding, Docket No. ER78-19. The similarity of these agreements[7] and the proximity of filing dates lead us to conclude that transmission services are being purchased by a number of utilities under the transmission availibility criteria discussed above. In accordance with Section 205(c), all service agreements must contain these availability criteria. The individual agreements may purport to be limited to a specific customer; however, FP&L's statement of company policy apparently controls in all instances where service is requested. Moreover, because a postage-stamp rate is involved, FP&L would be required to demonstrate that a different rate offered to a new customer would not be unduly discriminatory. This is, in effect, a tariff service.

We conclude that the objectives of Section 205(c) of the Federal Power Act and Section 35.2 of the Regulations would be better served by a single tariff than by the maintenance of numerous service agreements. Under either arrangement, the further availability of wheeling is, at least for now, determined by FP&L's criteria and not by this Commission. A single tariff will also provide us with a more efficient means of regulating these transmission services.

Therefore, we shall order FP&L to file one rate schedule, a tariff, which incorporates the voluntarily-established conditions of availability and the postage-stamp rate, and lists separately in an appendix those customers now receiving transmission service. If in the future FP&L should enter into additional or changed transmission service agreements containing rates, terms and conditions identical to those set out in the tariff, it need only file a

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[7]Although characterized as such by FP&L, most of these "agreements" have not been executed by the customers. The service provided to these customers is, therefore, indistinguishable from that available under a tariff.

service agreement under the tariff and substitute appendix pages with the Commission instead of additional rate schedules.

The Commission orders:

(A) The Staff motion of June 6, 1978, in Docket Nos. ER78-325, ER78-376 and ER78-19, to compel the amendment of transmission service agreements at issue in these 18 consolidated dockets is hereby granted.

(B) Within 40 days of the date of this order, FP&L shall file a tariff, in substitution for the 18 separate filings in these consolidated dockets, incorporating the provisions of the several transmission service agreements at issue, including the four criteria governing FP&L transmission service availability which were recited in the testimony of Mr. Ernest Bivans in Docket No. ER77-175 and listing the individual customers now receiving transmission services in an appendix thereto.

(C) The Secretary shall promptly publish this order in the Federal Register.

By The Commission.
(S E A L)

Kenneth F. Plumb,
Secretary

ATTACHMENT A

COMMISSION DOCKETS INVOLVING FLORIDA POWER & LIGHT CO. TRANSMISSION RATE FILINGS AT THE IDENTICAL POSTAGE-STAMP RATE

Docket	Customer	Suspension and Consolidation Order
(1) ER78-325	Homestead, Fl.	May 19, 1978
(2) ER78-376	Ft. Pierce, Fl.	June 15, 1978
(3) ER78-478	Lake Worth, Fl.	August 9, 1978
(4) ER78-508	Tampa Electric Co.	August 23, 1978
(5) ER78-527	Homestead, Fl. (suppl.)	August 30, 1978
(6) ER78-566	Vero Beach, Fl.	September 21, 1978
(7) ER78-567	Tampa Electric Co. (suppl.)	September 21, 1978
(8) ER79-44	Tampa Electric Co. (suppl.)	November 30, 1978
(9) ER79-162	Homestead, Fl. (suppl.)	March 22, 1979
(10) ER79-171	Ft. Pierce, Fl. (suppl.)	March 22, 1979
(11) ER79-172	Ft. Pierce, Fl. (suppl.)	March 22, 1979
(12) ER79-352	New Smyrna Beach, Fl. (suppl.)	June 28, 1979
(13) ER79-452	Jacksonville, Fl. (suppl.)	August 20, 1979
(14) ER79-522	Ft. Pierce, Fl. (suppl.)	September 14, 1979
(15) ER79-554	New Smyrna Beach, Fl. (suppl.)	September 14, 1979
(16) ER79-563	Lake Worth, Fl. (suppl.)	September 14, 1979
(17) ER79-574	Florida Power Corporation	September 14, 1979
(18) ER80-8	New Smyrna Beach, Fl. (suppl.)	December 4, 1979

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman;
Matthew Holden, Jr., and George R. Hall.

Florida Power & Light Company) Docket Nos. ER78-19,
ER80-141, ER80-156, ER80-199, *et al.*

ORDER DENYING REHEARING, ACCEPTING FOR FILING AND SUSPENDING RATE SCHEDULES AND DENYING MOTION FOR EXTENSION OF TIME

(Issued February 6, 1980)

On January 21, 1980, Florida Power and Light Company (FP&L) applied for rehearing of our order in these consolidated dockets which directed FP&L to submit a single tariff for application to interchange transmission services in substitution for 18 individual rate schedules.[1] FP&L has made no argument in its application that was not considered in our order, and rehearing shall be denied.

The application also requests clarification regarding the scope of the tariff to be filed. FP&L asks whether our order requires a tariff governing interchange transmission services, or

> ...requir[es] FPL to file a tariff under which transmission services would be generally available, not limited to the implementation of interchange agreements but emcompassing any conceivable transmission transaction as long as that transaction is arguably within the ambit of the policy statement.

[1]Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules (December 21, 1979).

Our order required FP&L to consolidate its numerous rate schedules into a single tariff for interchange transmission services, and include therein its statement of company policy on wheeling availability. The order did not purport to interpret FP&L's policy. That policy may encompass more than interchange services; however, FP&L itself must clarify any ambiguities by delimiting its scope. The company may, of course, file a new statement on transmission availability which identifies any transmission service not included.[2]

Since the date of our order, FP&L has tendered three additional interchange transmission rates. On December 21, 1979, a service schedule was submitted for New Smyrna Beach, Florida (Docket No. ER80-141). On December 28, 1979, a schedule was tendered for Tampa Electric Co. (Docket No. ER80-156). And, on January 22, 1980, a schedule was submitted for Orlando, Florida (ER80-199). Each of these schedules is identical to those considered in the order directing the submission of a tariff, and FP&L requests that cost support from Docket No. ER78-19, *et al.*, be incorporated by reference. Our order stated (at 7) that all additional or changed service agreements should be made part of the tariff.

The service agreements submitted in these three new dockets have not been shown to be just and reasonable, and may be unjust unreasonable, unduly discriminatory or otherwise unlawful. Rather than deal with these submissions in separate orders, we shall now accept them for filing, suspend each for one day, and consolidate the three dockets with Docket No. ER78-19 as we have done with all service agreements in the sequence of transmission rate filings.[3] FP&L shall include these three service agreements, executed or unexecuted as the case may be, in the tariff which it submits.

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[2]Any new availability statement should also be filed in Docket No. ER77-175 where FP&L's wheeling policy is an issue. We should be apprised of any change in that policy before reaching our decision.

[3]Protests and petitions to intervene in these proceedings will be accepted until the dates specified in the notices of these filings issued by the Commission's Secretary.

Finally, we shall address FP&L's motion for an extension of time in which to comply with our order of December 21, 1979. It requests either an indefinite extension, pending the outcome of other proceedings, or a new compliance date 30 days after we dispose of the application for rehearing. This motion is denied; however, we shall give FP&L seven additional days in which to comply with our order.

The Commission orders:

(A) FP&L's application for rehearing of our order of December 21, 1979, is hereby denied.

(B) FP&L's motion for an extension of time is hereby denied.

(C) FP&L's submissions of service agreements in Docket Nos. ER80-141, ER80-156 and ER80-199 are hereby accepted for filing and suspended for one day, they shall become effective, subject to refund, on February 20, 1980, February 27, 1980, and March 23, 1980, respectively. FP&L is directed to include these agreements as part of its tariff filing.

(D) Within seven days of the date of this order, FP&L shall file the transmission tariff required by this order and our order of December 21, 1979.

(E) The Secretary shall promptly publish this order in the Federal Register.

By The Commission.
(S E A L)

Kenneth F. Plumb,
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Company	**)Docket Nos. ER78-19,**
	)ER80-141, ER80-156,
	)ER80-199, *et al.*

ERRATUM NOTICE
(February 26, 1980)

ORDER DENYING REHEARING, ACCEPTING FOR FILING AND SUSPENDING RATE SCHEDULES AND DENYING MOTION FOR EXTENSION OF TIME
(Issued February 6, 1980)

The following ordering paragraph was omitted from the Commission's order of February 6, 1980:

(F) Docket Nos. ER80-141, ER80-156 and ER80-199 are hereby consolidated with Docket Nos. ER78-19, *et al.*, for purposes of hearing and decision.

Kenneth F. Plumb
Secretary

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-5259

FLORIDA POWER & LIGHT COMPANY
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission (Florida Case)

[Filed May 29, 1980]

ORDER:

IT IS ORDERED that the motion of the Cities of Key West, Kissimmee, St. Cloud, Tallahassee and the Sebring Utilities Commission for leave to intervene is GRANTED, conditioned upon the filing of a joint brief by all intervenors.

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Florida Power & Light Company)Docket Nos ER80-411,
)ER80-417, and ER80-438

ORDER ACCEPTING IN PART FOR FILING AND REJECTING IN PART SUPPLEMENTS TO SERVICE AGREEMENTS

(Issued July 22, 1980)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr. and George R. Hall.

By letters dated May 21, May 28, and June 3, 1980[1] Florida Power & Light Company (FP&L) submitted for filing supplements to Service Agreements under its Transmission Tariff with the Jacksonville Electric Authority, Lake Worth Utilities Authority, and New Smyrna Beach Utilities Commission, providing for additonal wheeling under FP&L's transmission tariff.[2] FP&L also submitted amendments to its now superseded individual transmission agreements with the above customers providing for the same additional wheeling services.[3]

On June 23, 1980, the Lake Worth Utilities Authority and New Smyrna Beach Utilities Commission (Petitioners) filed a "Protest and Request for Suspension and Consolidation" in Docket Nos. ER80-417 and ER80-438. The Petitioners object to FP&L's filing of amendments to its now superseded individual transmission conracts as well as supplements to service agreements under the

[1]We note that FP&L has by letters dated June 23 (ER80-479, 480), June 24 (ER80-486), and June 30, 1980 (ER80-498-501) made very similar if not identical filings. Because of this similarity, it is our intention that such filings be handled by the Director of the Office of Electric Power Regulation pursuant to Section 3.5(g) of the Commission's Regulations.

[2]See Attachments for Supplements to Service Agreements.

[3]By orders issued December 21, 1979, and February 21, 1980, FP&L was directed to submit a transmission tariff and related service agreements in substitution for numerous individual transmission agreements. By Order issued May 14, 1980, in Docket No. ER78-19, 11 FERC¶61,159, FP&L's tariff was accepted, superseding all individual contracts.

Tariff. Petitioners request that the supplements to the transmission service agreements under the tariff be accepted for filing, that such supplements be suspended and that Docket Nos. ER80-417 and ER80-438 be consolidated with Docket No. ER79-18, *et al.* FP&L filed a reply to this Protest on July 8, 1980.

FP&L's submittal of amendments to previously effective individual transmission agreements is inappropriate since such agreements have been superseded by FP&L's transmission tariff. Accordingly, such amendments are rejected pursuant to Section 35.5 of the Commission's Regulations.

The supplements to the transmission service agreements submitted by FP&L herein simply provide for additional service under FP&L's filed tariff under terms, conditions and rates which are subject to refund in Docket No. ER78-19, *et al.* No additional findings of fact or determinations of law are necessitated by the supplementary filings in the present dockets because no new issues have been raised.

Docket numbers are automatically assigned to service agreements such as these when they are filed with the Commission however, suspension of the supplements and consolidation of these dockets with Docket No. ER78-19, *et al.*, is inapropriate and unnecessary.[4] For purposes of administrative efficiency we shall terminate Docket Nos. ER80-411, ER80-417 and ER80-438. The supplements are accepted for filig to become effective pursuant to the Commission's order of May 14, 1980, in Docket Nos. ER78-19, *et al.*

The Commission orders:

(A) The amendments to the superseded individual transmission agreements are rejected.

(B) The supplements to the service agreements under FP&L's current transmission tariff are accepted for filing, effective pursuant to the Commission's May 14, 1980 order in Docket No. ER78-19, *et al.* accepting and suspending that tariff.

(C) Docket Nos. ER80-411, 417 and 438 are hereby terminated.

(D) The Secretary shall promptly publish this order in the Federal Register.

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[4]Since petitioners are intervenors in Docket No. ER78-19, they will have full opportunity to be heard on the necessary issues.

Attachment
Florida Power & Light Company

Filed: (1)-(4) May 21, 1980; (5)-(8) May 28, 1980; (9)&(10) June 3, 1980

(1) thru (10) below are designated as Supplements and Exhibits to Service Agreements under FERC Electric Tariff Original Volume No. II (Sheet Nos. 1-19)

Docket No	*Designation*	*Description*	*Other Party*	*Effective Dates*
(1) ER80-411	Supplement No. 6	Exhibit 1 (Service Specifications)	Jacksonville Electric Authority (JEA)	April 10, 1980
(2) ER80-411	Exhibit A to Supplement No. 6	Appendix A (Contract dated 9/4/79)	JEA with New Smyrna Beach, Florida	N/A
(3) ER80-411	Supplement No. 7	Exhibit 1 (Service Specifications)	JEA	April 10, 1980
(4) ER80-411	Exhibit A to Supplement No. 7	Appendix A (Contract dated 3/20/80)	JEA with Gainesville, Florida	N/A
(5) ER80-417	Supplement No. 8	Exhibit 1 (Service Specifications)	Lake Worth Utilities Authority (Lake Worth)	May 28, 1980
(6) ER80-417	Exhibit A to Supplement No. 8	Appendix A (Contract dated 2/18/80)	Lake Worth with Lakeland, Florida	N/A
(7) ER80-417	Supplement No. 9	Exhibit 1 (Service Specifications)	Lake Worth	May 28, 1980
(8) ER80-417	Exhibit A to Supplement No. 9	Appendix A (Contract dated 3/18/80)	Lake Worth with Vero Beach, Florida	N/A
(9) ER80-438	Supplement No. 10	Exhibit 1 (Service Specifications)	Utilities Commission of New Smyrna Beach	June 3, 1980
(10) ER80-438	Exhibit A to Supplement No. 10	Appendix A (Contract dated 3/18/80)	Utilities Commission of New Smyrna Beach with Vero Beach, Florida	N/A

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5922

FLORIDA POWER AND LIGHT COMPANY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission

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[Filed January 9, 1981]

ORDER

IT IS ORDERED that the petition of the Cities of KEY WEST, KISSIMEE, ST. CLOUD, TALLAHASSEE, and the SEBRING UTILITIES COMMISSION to intervene is granted.

/s/ Albert J. Henderson
UNITED STATES CIRCUIT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

February 9, 1981

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-5922

FLORIDA POWER & LIGHT COMPANY

v.

FEDERAL ENERGY REGULATORY COMMISSION

(ER80-411, ER80-417, ER80-438)

The following action has this day been taken in the above case;

☐ AN EXTENSION OF TIME has been granted to and including:

for filing appellant's/petitioner's brief.
for filing appellee's/respondent's brief.
for filing reply brief.
for filing petition for rehearing.

☐ Motion to consolidate granted.

- ☐ Motion to supplement or correct the record granted.
- ☐ Motion for leave to file supplemental brief granted.
- ☐ Motion for leave to file brief *amicus curiae* is granted.
- ☐ Joint motion as to time for filing briefs granted.
- ☑ Order enclosed has been entered.

GILBERT F. GANUCHEAU, Clerk

By: _____
Deborah W. Cannon, Deputy Clerk

cc:
Mr. Floyd L. Norton
Mr. Jerome Nelson
Mr. Robert A. Jablon
Mr. Harry A. Poth, Jr.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNIT B

No. 80-5922

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of An Order of the Federal Energy Regulatory Commission

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[Filed February 9, 1981]

ORDER:

IT IS ORDERED that the stipulation of parties to hold proceeding in abeyance in 80-5922 pending final disposition in cause number 80-5259 is granted.

Albert J. Henderson
UNITED STATES CIRCUIT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

November 6, 1981

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-5259

FLORIDA POWER & LIGHT COMPANY
v.
FEDERAL ENERGY REGULATORY COMMISSION

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a susbstantial question is to be presented to the

Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By _____

Emilis O'Neal, Deputy Clerk

cc: Messrs. Robert T. Hall, III
Richard M. Merriman
Floyd L. Norton, IV
Ms. Jane Murphy
Mr. Robert A Jablon

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NO. 80-5259

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT*

UNIT B November 6, 1981

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before HENDERSON, ANDERSON and SAM D. JOHNSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

The question petitioner Florida Power & Light Company ("FP&L") asks us to answer is whether the Federal Energy Regulatory Commission ("Commission") has the authority to compel FP&L to file a tariff including an FP&L policy relating to the availability of electric transmission service. FP&L's position is that filing such a tariff in effect would require FP&L to offer electric transmission service to all customers and would convert it into a common carrier for such service. FP&L argues that this amounts to compelled wheeling, which is beyond the authority of the Commission.[1] The Commission, supported by the intervenors,[2] counters that no wheeling has been compelled at all

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

[1]Wheeling may be defined as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 368, 93 S.Ct. 1022, 1025, 35 L.Ed.2d 359 (1973).

[2]The intervenors are City of Gainesville, City of Starke, City of Homestead, City of Kissimmee, City of St. Cloud, City of Key West, City of Tallahassee, The Ft. Pierce Utilities Authority, The Lake Worth Utilities Authority, The New Smyrna Beach Utilities Commission, and The Sebring Utilities Commission. All are cities in Florida with municipal utilities or the municipal utility commission for various Florida municipalities.

and that it has merely enforced a provision of its regulations specifying the information to be included in rate filings. *FP&L's grievance arises out of two orders which were issued as a part of a larger, and still on-going, proceeding. Docket No. ER78-19, et al.*[3]. We conclude that FP&L has in effect been made to assume common carrier status and that the Commission had no authority to order the tariff and policy be filed. Therefore, we reverse.

I. FACTS

FP&L is the largest electric utility in the State of Florida with a service area predominantly in the eastern and southern parts of Florida. Together with Florida Power Corporation, Florida's second largest electric utility, FP&L's transmission facilities cover nearly all of peninsular Florida. Use of these transmission facilities is frequently necessary for smaller municipally and cooperatively owned utilities, such as intervenors, to obtain electric power to supplement their own production or to obtain base-load power more economically than could be produced by the smaller utilities. The need for smaller utilities to have access to transmission service has increased in recent years and, for some, economic survival may depend on such access.

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[3]Proceedings in Docket No. ER78-19, *et al.*, were initiated in October, 1977, when FP&L filed proposed limitations on the availability of firm wholesale requirements service, together with notices of cancellation of such service to specified wholesale customers, and proposed increases in the rates for this wholesale requirement service. Docket No. ER78-19, *et al.*, was bifurcated into Phase I, dealing with the tariff availability restriction and the cancellation of service, and Phase II, dealing with the increase in rate. The two orders which we review on this petition are not essential parts of either Phase I or Phase II, and touch on matters subsidiary to the questions of those Phases. Before issuing the two orders now under review, the Commission issued its Phase I decision in Opinion No. 57, Opinion and Order Reversing Initial Decision and Rejecting Tariff Availability Limitations and Notice of Cancellation, 32 Pub.U.Rep. 4th [PUR] 313 (Aug. 3, 1979), rehearing denied Opinion No. 57-A, Opinion and Order Denying Rehearing Issued (October 4, 1979), appeal dismissed *sub nom. Florida Power & Light Co. v. FERC*, No. 79-2414, (D.C. Cir., April 25, 1980). An initial decision was issued by an administrative law judge in Phase II on July 24, 1980. At the time briefs were filed in the instant petition, the Commission had yet to issue an opinion with respect to Phase II.

In May, 1978, FP&L filed a rate schedule for interchange transmission service for the municipal utility of Homestead, Florida.[4] Shortly thereafter, FP&L filed a second such rate schedule for the municipal utility of Fort Pierce, Florida.[5] These rate proceedings were consolidated with the pending proceeding in Docket No. ER78-19, *et al.*

On June 6, 1978, the Commission staff moved to compel FP&L to file amended schedules governing the interchange transmission service provided to Homestead and Fort Pierce. The staff requested that the schedules be modified to include a company policy, enunciated by an FP&L vice president, Mr. Ernest Bivens, regarding the availability of transmission services.[6] This statement of policy was sworn, prepared testimony filed in Docket No. ER77-175 as rebuttal to certain staff assertions that FP&L had unduly discriminated among potential users of its transmission services.[7] Mr. Bivens listed four criteria on which FP&L conditions the availability of transmission services:

> Q. Does the failure of FP&L to file a generally applicable transmission tariff reflect any intention by FP&L to preclude neighboring utilities from obtaining transmission service?

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[4]Docket No. ER78-325.

[5]Docket No. ER78-376.

[6]The staff did not request that the schedules be filed as a tariff. (Joint Appendix ["JA"], pp. 2077-79).

[7]Docket No. ER77-175 is a proceeding arising from a proposed rate offered by FP&L for long-term transmission service to the Utilities Commission of New Smyrna Beach, Florida, under which FP&L would transmit New Smyrna's owned share of power and energy from Florida Power Corporation's Crystal River No. 3 nuclear unit. Because of differences between this transmission service and that offered to Homestead and Fort Pierce and differences in supporting data, Docket No. ER77-175 was not consolidated with Docket No. ER78-19, *et al.* An initial decision in Docket No. ER77-175 was issued November 28, 1978, and at the time the briefs were filed in the instant petition, the Commission had not yet reviewed that initial decision.

A. Most emphatically not. We are willing to provide transmission service when:

1. The specific potential seller and buyer are contractually identified;

2. The magnitude, time and duration of the transaction are specified prior to the commencement of the transmission;

3. It can be determined that the transmission capacity will be available for the term of the contract; and

4. The rate for such service is sufficient to compensate FP&L for its costs.

(J.A. p. 2207, quoting from Docket No. ER77-175, transcript p. 118). The staff further requested that FP&L be required to include this statement of policy in all future transmission service agreements.

The Commission deferred action on the staff motion for approximately a year and a half. During the interim, FP&L filed 16 additional interchange transmission serice schedules, each of which was accepted for filing, suspended, and consolidated into Docket No. ER78-19, *et al.*[8] Some of these filings were to amend

[8]The additional 16 schedules are as follows:

Docket	Customer
ER78-478	Lake Worth, Florida
ER78-508	Tampa Electric Co.
ER78-527	Homestead, Florida
ER78-566	Vero Beach, Florida
ER78-567	Tampa Electric Co.
ER79-44	Tampa Electric Co.
ER79-162	Homestead, Florida
ER79-171	Ft. Pierce, Florida
ER79-172	Ft. Pierce, Florida
ER79-352	New Smyrna Beach, Florida
ER79-452	Jacksonville, Florida
ER79-522	Ft. Pierce, Florida
ER79-554	New Smyrna Beach, Florida
ER79-563	Lake Worth, Florida
ER79-574	Florida Power Corp.
ER80-8	New Smyrna Beach, Florida

previously filed rate schedules. Each of these schedules provided for interchange transmission service at the identical, postage-stamp rate,[9] with supporting evidence based on cost data from the same 1978 test year.[10]

The Commission granted the staff's motion in an order issued December 21, 1979.[11] The Commission ordered FP&L to "file a tariff, in substitution for the 18 separate filings..., incorporating the provisions of the several transmission service agreements at issue, including the four criteria governing FP&L transmission service availability which were recited in the testimony of Mr. Ernest Bivans in Docket No. ER77-175...." (J.A., p. 2212). The Commission justified the requirement that a tariff be filed in lieu of individual agreements on several grounds. The objectives of Section 205(c) of the Federal Power Act ("FPA"), 16 U.S.C.A. § 824d(c) (West 1974),[12] and Section 35.2 of its Regulations, 18 C.F.R. § 35.2 (1980), as well as administrative efficiency, would

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FP&L attacked the Commission's suspension order in four of the interchange transmission schedules consolidated, namely, Docket Nos. ER78-325, 478, 508 and 566. The District of Columbia Circuit has upheld these suspension orders. *Florida Power & Light Co. v. FERC*, 617 F.2d 809 (D.C.Cir.1980).

[9]The FERC's brief defines a postage stamp transmission rate as the same unit rate per kilowatt, regardless of distance, based on the average cost of wheeling power anywhere over a transmission network. (FERC Brief, p. 6).

[10]FP&L asserts in its brief that there were variations in the services provided under the agreements. For example, some agreements provided for emergency service for 72 hours, while the Homestead and Ft. Pierce agreements provided for emergency service for 30 days (FP&L intitial brief, p. 8.) The Joint Appendix does not contain copies of these agreements, but none of the parties contest this characterization. The Commission found the service agreements "similar."

[11]Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules, Docket No. ER78-19, *et al.*, issued December 21, 1979.

[12]See footnote 22, *infra*, for the text of Section 205(c).

better be served with a single tariff than by the maintenance of numerous service agreements. The similarity of the filed agreements and the proximity of the filing dates indicated that, as a matter of fact, the policy of availability did control FP&L's decision of whether to grant requested transmission. Also, because a postage stamp rate is involved with each individual agreement, FP&L would be required in the future to demonstrate that any service at a different rate to a new customer would not be unduly discriminatory, making the filings a tariff service in substance.

FP&L had objected vociferously to the Commission's requirement that Mr. Bivans' statement of policy be included in the tariff. The Commission held that this policy statement was a "practice" within the meaning of § 205(c) of the FPA and § 35.1(a), 18 C.F.R. § 35.1(a) (1980), of its regulations. It concluded that because FP&L intended the Commission to rely on this policy statement in Docket No. ER77-175, FP&L should have anticipated these availability criteria would be published and given effect. Because the policy statement was from FP&L itself, the inclusion of the statement in the tariff would in no way expand FP&L's transmission service obligation, and thus did not amount to compelled wheeling.

FP&L timely filed a petition for rehearing of this order. During the interim between the original order and the Commission's decision on rehearing, FP&L filed three additional interchange transmission rate schedules.[13] The Commission similarly accepted these filings, suspended each for one day, and consolidated each with Docket No. ER78-19, *et al.* The Commission denied rehearing.[14] In the only amplification of the first order, the Commission refused to state whether FP&L's policy statement was one for only interchange transmission service or for transmission service in general.

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[13]New Smyrna Beach, Florida, Docket No. ER80-141; Tampa Electric Co., Docket No. ER80-156; and Orlando, Florida, Docket No. ER80-199.

[14]Order Denying Rehearing, Accepting for Filling and Suspending Rate Schedules and Denying Motion for Extension of Time, Docket No. ER78-19, *et al.*, issued February 6, 1980.

II. COMMISSION AUTHORITY TO ORDER THE TARIFF AND POLICY STATEMENT TO BE FILED

The crux of this controversy turns upon what authority the Commission has under the FPA to order the transmission of electricity, and what authority it has to control the format of its filings. We, therefore, begin with an analysis of the FPA. The FPA, as originally enacted, did not permit the Commission to compel wheeling nor did it require utilities to provide wheeling upon request.[15] The legislative history of the FPA makes clear that Congress did not intend the Commission to have power to compel wheeling. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-6, 93 S.Ct. 1022, 1028-1029, 35 L.Ed.2d 359 (1973), as well as the dissent at 383-387, 93 S.Ct. at 1032-1034, for a thorough discussion of the relevant legislative history of the FPA; *see also New York State Electric & Gas Corp. v. FERC*, 683 F.2d 388 (2d Cir. 1980), *U.S. appeal pending; Richmond Power & Light of Richmond, Indiana v. FERC*, 574 F.2d 610

[15]In November, 1978, the Public Utility Regulatory Policies Act, Pub.L. No. 95-617, 92 Stat. 3136 (1978), amending the FPA, expanded the Commission's powers to include the authority to compel wheeling in certain circumstances. Under new §§ 211 and 212 of the FPA, 16 U.S.C.A. §§ 824j and 824k (West Supp. 1980), the Commission may require one utility to provide transmission servics upon application of a second utility if certain substantive and procedural requirements are met. For example, under § 824j(a), an electric utility may obtain an order requiring a second utility to wheel if, after notice and a hearing it is determined that such service (1) is in the public interest, (2) conserves a significant amount of energy, significantly promotes the efficient use of facilities and resources, or improves reliability of any electric utility system, (3) is not likely to result in a reasonably ascertainable uncompensated economic loss for the transmitting utility, (4) will not place an undue burden on the transmitting utility, (5) will not unreasonably impair the reliability of the transmitting utility, and (6) will not impair the ability of any electric utility affected to render adequate service to its customers. Neither the Commission nor the Commission's counsel attempt to justify the orders now on review under these provisions since the procedures specified in the new §§ 211 and 212 have not been complied with.

(D.C.Cir. 1978). Bills introduced in Congress, but never enacted, would have imposed the oblibations of a common carrier upon utilities with respect to transmission of electricity.[16] The Congress refused to pass these bills and, as evidenced in the Senate Report of the FPA, chose to leave the decision on wheeling to the "voluntary coordination of electric facilities." S.Rep. No. 621, 74th Cong., 1st Sess., at 19.

While the Commission may not compel the transmission of electricity, it does possess the authority to review transmission contracts under § 206(a) and to make modifications of those contracts upon a determination that the terms of such a contract are unjust, unreasonable, unduly discriminatory, or preferential. *New York State Electric & Gas Corp. v. FERC, supra; Richmond Power & Light of Richmond, Indiana v. FERC,* 574 F.2d at 620. It also has the authority to review any change in such a contract under § 205. In performing these functions with respect to a wheeling contract, though, the Commission must be especially careful not to overstep its authority and require the involuntary wheeling of electricity, absent compliance with the new §§ 211 and 212 of the FPA.

In two recent cases, the courts have rejected ingenious arguments which would have established the Commission's authority to requuire wheeling by indirect means. In *New York State Electric & Gas Corp.*, the Commission ordered the deletion from a wheeling contract of a provision prohibiting a municipal utility from selling wheeled power outside its city limits. The Commission attempted to justify this order on the ground its order only removed a restriction on the use of wheeled power and that no wheeling was compelled. It attempted to disassociate its

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[16]S.1725, 74th Cong., 1st Sess., § 213, pp. 105-106, had the following provision:

> It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor...

HR 5423, 74th Cong., 1st Sess., § 213, pp. 104-105, had an identical provision.

removal of the territorial restriction from the amount of power the wheeling utility would ultimately transmit. The Commission contended that the wheeling utility has not yet reached its full capacity allocation under the contract, and therefore, removal of the geographic restriction would not result in involuntary wheeling. The Second Circuit did not accept this analysis. Finding that the Commission's order would compel the utility to transmit an amount of power over and above that contracted for, the Second Circuit concluded that the Commission had exceeded its authority by ordering involuntary wheeling.

In *Richmond,* a utility attempted unsuccessfully to convince the Commission that rates proposed in a national, voluntary program to transmit coal-generated power from the mid-west to the oil-short east were unreasonable because the utilities had submitted rates only for voluntary wheeling. The utility argued that the Commission's authority to reject unreasonable rate proposals and to set reasonable rates included the power to condition approval of the proposed rates on involuntary wheeling. The District of Columbia Circuit concluded the Commission had acted properly, stating:

> If Congress had intended that utilities could inadvertently boostrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling in favor of a call for just such voluntary wheeling.

574 F.2d at 620.

Counsel for the Commission point to four possible rationales for the decision at issue: first, that the orders at issue in fact do not constitute compelled wheeling; second, that the decision is justified because FP&L's policy statement constituted a "practice" and thus was properly required to be filed as part of a tariff under the statute and regulations; third, that the decision is justifiable as a remedy for FP&L's past anticompetitive activity;

and fourth, that FP&L is estopped from changing its policy of availability. We discuss each argument in turn.[17]

A. Do the Commission's Orders Require Involuntary Wheeling?

The Commission reasoned in the decision on review that its order in no way expanded the transmission service obligation which FP&L has voluntarily undertaken. In other words, the Commission stated it had done nothing which requires FP&L to wheel involuntarily since the tariff and policy ordered to be filed had been adopted voluntarily by FP&L. The Commission's counsel glossses this justification by insisting that there has been no compelled wheeling because FP&L has given no indication it desires to change its policy. Commission's counsel at oral argument insisted that the question before this court is not whether the Commission may require transmission service if and when a customer in the future is refused wheeling services or whether the Commission has the authority under § 206(a) to find the tariff unjust and unreasonable or to pass on any proposed change under § 205(d). The Commission's counsel maintains that these are questions for another proceeding if and when the Commission takes the foregoing action. Commission's counsel asserts that all that has been done is to require FP&L to file the tariff and policy as an informational aid both to the Commission and to FP&L's potential customers.

We believe the Commission has failed to perceive the thrust of FP&L's objection. FP&L does not complain that the Commission has at this time issued an order requiring it to provide transmission service to a particular applicant to which it otherwise would not have wheeled. Instead, FP&L objects that the Commission's actions have imposed upon it an obligation to

[17] Because some service agreements were unexecuted, the Commission stated that the service provided to those customers is indistinguishable from that available under a tariff. We fail to perceive how the failure to file executed contracts indicates that FP&L was willing to offer wheeling on a tariff basis. Neither the Commission nor its counsel explained how this could occur. We find this statement by the Commission in the orders on review puzzling and unconvincing.

provide transmission service beyond that which it has voluntarily assumed. FP&L objects that in the future it will be required to provide wheeling for any utility requesting tariff service. In effect, FP&L complains that it has now been made a common carrier.

Under common law, a common carrier is one who holds himself out as engaged in the business of providing a particular service to the public. *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936); *State of Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 48 S.Ct. 41, 72 L.Ed. 241 (1927). Common carrier status has a quasi-public character, which arises out of the undertaking "to carry for all people indifferently..." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C.Cir. 1976). A carrier will not be a common carrier where its practice is to make individualized decisions in particular cases as to whether and on what terms to serve. *Ibid.; Semon v. Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. 1960). The controlling factor in determining carrier status is the public profession or holding out. *Semon v. Royal Indemnity Co., supra;* 13 Am.Jur.2d, *Carriers*, § 2. The Commission made no findings in this regard, and did not rely upon the common law rationale; accordingly we express no opinion upon the issue of what circumstances might invoke the doctrine of common carrier status established by common law.

Several remarks are appropriate in order to understand whether the Commission's actions amount to compelling involuntary wheeling. First, the parties agree as to the effect of filing a tariff together with the policy statement. FP&L would have to abide by the terms of the tariff and policy statement in offering transmission service in the future. So long as the tariff and policy remain on file, they are to be treated as a statute, binding upon FP&L and the purchaser alike. *Northwestern Public Service Co. v. Montana-Dakota Utilities Co.*, 181 F.2d 19 (8th Cir. 1950), *aff'd.*, 341 U.S. 246, 71 S.Ct. 692, 95 L. Ed. 912 (1951). Because a tariff has been filed, FP&L may not deviate from it in entering interchange transmission service agreements with municipal utilities without filing a change in the tariff. Those

utilities requesting wheeling under the terms of the tariff would be entitled to receive transmission service so long as the availability criteria are complied with.[18] In other words, FP&L would be required to serve all qualifying customers until the Commission changes the availability criteria. A customer refused such service could petition the Commission to find that FP&L's practice with respect to its policy of availability is unduly discriminatory under § 206(a) of the FPA.

The parties, however, disagree as to the result of FP&L's having filed 23 individual schedules with postage stamp rates without a tariff filing. The Commission, citing *Town of Norwood v. FERC*, 587 F.2d 1306 (D.C.Cir. 1978), maintains that even without a filed tariff and policy statement, a utility which was refused wheeling service in the future by FP&L could petition the Commission under § 206(a) to find such a refusal to be discriminatory. Thus, the Commission reasons that no new restrictions have been placed on FP&L by the filed tariff and policy. In other words the Commission argues, relying upon *Town of Norwood,* that the fact of the 23 individual schedules already places FP&L in the same position as if a tariff had been filed. However, *Town of Norwood* does not so hold. There an electric utility had entered a wheeling contract with a fixed rate provision, barring any change in the rate. *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956). The utility was willing to wheel power to a second customer but at higher rates. The second customer petitioned the Commission, claiming undue discrimination. The wheeling utility made no argument that it was free to pick and choose to which customer it would wheel. There was no issue of involuntary wheeling. Instead, the issue was the proper remedy for discrimination in rates when one

[18]The form of a tariff as specified in the Commission rules includes conditions of availability. 18 C.F.R. §§ 35.2 and 154.38(b). Thus, by ordering Mr. Bivans' statement of availability policy to be filed, the Commission has incorporated FP&L's policy as the statement of conditions of availability. (See Commission brief of Sept. 9, 1980. p. 14.)

contract is a fixed rate contract, not subject to change by the Commission except by a § 206(a) proceeding. In this regard, FP&L has not argued that if more than one wheeling agreement is filed, the Commission is precluded from determining that a difference in rates would constitute undue discrimination. FP&L is concerned to preserve its right in the future to refuse wheeling services to applicants. No case is cited, and we have found none, in which a utility which was refused wheeling services brought a petition under § 206(a) for the Commission to find such a refusal discriminatory where no tariff was on file.[19] We have serious doubts that such a petition would be successful in the absence of a tariff. In *FPC v. Conway Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), the Surpreme Court held that the Commission may consider rates over which it does not have jurisdiction in considering whether proposed rates over which it does have jurisdiction are discriminatory. In strong dictum however, the Supreme Court indicated that the Commission does not have authority to remedy any discriminatory action by requiring a change in rates over which it has no jurisdiction. The Court stated there:

> The prohibition against discriminatory or preferential rates or services imposed by § 205(b) and the Commission's power to set just and reasonable rates under § 206(a) are accordingly limited to sales "subject to the jurisdiction of the Commission," that is, to sales of electric energy at wholesale. The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail sales.

426 U.S. at 276-77, 96 S.Ct. at 2003. Any applicant which was refused wheeling services by FP&L would have to overcome this

[19]Nor have we found cases where applicants which were refused any other service have brought a claim of undue discrimination to the Commission where no tariff was on file.

dictum in bringing a § 206(a) petition before the Commission, and also would have to overcome the legislative history and case law indicating that the Commission is without power to compel wheeling.[20]

The parties do not dispute that in the future, if FP&L wishes to alter its policy of availability, it will, if there is a tariff, have to follow the § 205(d) and (e) procedure of filing the proposed change with the Commission. The Commission under this procedure may investigate such a change and reject it as unjust and unreasonable. FP&L, thus, has lost the freedom to alter its policy of availability with respect to wheeling. Moreover, the parties also agree that the Commission under § 206(a) would have the authority to investigate sue sponte FP&L's tariff and policy of availability to determine whether any feature is unjust, unreasonable, unduly discriminatory, or preferential. If such a determination is made, the Commission may adjust the tariff and policy. The Commission in the orders on review clearly indicated that in the future it may require FP&L, either in Docket No. 77-175 or in some other proceeding to amend its tariff if it is found to be unjust or unreasonable. (J.A. p. 2210.) This would include FP&L's policy of availability. Thus, if there is a tariff, the Commission could in the future alter FP&L's policy to one undesired by FP&L's management.

We agree with FP&L that the Commission's order does in effect impose common carrier status upon FP&L. While the tariff is on file, FP&L would be obligated to provide the tariff service to all customers. In a significant sense, its duties and liabilities have changed. Although FP&L had a policy regarding the availability of wheeling, FP&L, nevertheless, negotiated interchange transmission service agreements on an individual basis with each municipal utility when approached. There is no indication in the record that FP&L has voluntarily agreed to

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[20]The Commission and intervenors complain that FP&L is arguing for license to discriminate in offering wheeling services. Of course, nothing precludes the intervenors from bringing the appropriate antitrust action if FP&L's actions warrant such.

become a common carrier. These is no indication that FP&L has voluntarily agreed that any change in the terms of its policy, or any interpretation thereof, should be submitted to the Commission for its approval. The imposition of common carrier status on FP&L, which the orders at issue accomplish, is precisely the authority which the FPA denies the Commission. The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request. Accordingly, we conclude that the Commission lacked statutory authority to issue the orders in question.[21]

B. Is the availability policy a "practice" within the meaning of § 205(c)?

A second ground for the Commission's decision was its conclusion that FP&L's availability policy constituted a "practice" within the meaning of § 205(c) of the FPA and § 35.1

[21]The Commission, in rejecting FP&L's argument that *Otter Tail* had interpreted the FPA to prohibit compelled wheeling, stated that *Otter Tail* had noted that terms and conditions governing transmission services are subject to Commission oversight, citing to 410 U.S. at 376-77, 93 S.Ct. at 1028-1030. The Commission misconstrues *Otter Tail*. In *Otter Tail* the Supreme Court was concerned in part with the question of whether the antitrust remedy ordered by the district court conflicted with Commission jurisdiction insofar as the district court had ordered both wheeling and interconnections. The Supreme Court held there was no conflict with respect to wheeling since the Commission had no authority to compel wheeling. 410 U.S. at 375-76, 93 S.Ct. at 1028-1029. The part of the decision cited by the Commission dealt with the Supreme Court's discussion of possible conflict with the Commission's authority to order interconnections. The Supreme Court noted that "future disputes over interconnections and the terms and conditions governing those interconnections will be subject to Federal Power Commission perusal." 410 U.S. at 376-77, 93 S.Ct. at 1029. The Commission has the authority under § 202(b) of the FPA to order physical connection of transmission facilities. Thus, the citation relied upon by the Commission referred to its authority over interconnections, for which there is a statutory basis, and does not support its actions with respect to wheeling.

of its Regulations. 18 C.F.R. § 35.1(a) (1980).[22] A policy of availability has been held to be a "practice," subject to the filing requirements, with respect to a pipeline tariff. See *Michigan-Wisconsin Pipeline Company*, 34 FPC 621, 626 (1965).[23] As explained above, a practice made a part of a filed tariff, is subject to the Commission's right to review such practice and to pass on changes within it.[24] A reviewing court normally should adhere to the construction of a statute by an agency charged with its execution unless there are compelling reasons that such construction is wrong. *ECEE v. FERC*, 611 F.2d 554, 563 (5th Cir. 1980). In the context of wheeling, the FPA's legislative

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[22]Section 205(c) of the FPA, 16 U.S.C.A. § 824d(c) (West 1974), reads in full:

> (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

18 C.F.R. § 35.1(a) (1980) reads in pertinent part:

> Every public utility shall file with the Commission and post, in conformity with the requirements of this Part, full and complete rate schedules, as defined in § 35.2(b), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates and charges and all contracts which in any manner affect or relate to such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. § 824d(c)).

[23]Provisions of the Natural Gas Act are to be read *in pari materia* with analogous provisions of the FPA. *FPC v. Sierra Pacific Co., supra.*

[24]See discussion in Part II.A. of this opinion.

history is a compelling reason why we may not defer to the Commission's interpretation. Having held that the FPA prevents the imposition of common carrier status on utilities for wheeling services, it would make no sense to permit the imposition of this status by the device of requiring a utility to file any policy of availability as a practice. It is reasonable to assume that any well-managed utility will have a policy governing the availability of wheeling services and will act on this policy. Giving the Commission the authority to order a policy of availability to be filed as a "practice" could vitiate Congress' desire to leave utilities free to make wheeling decisions.

C. Anticompetitive Remedy.

The Commission's counsel and intervenors argue that the Commission justified, in part, its requirement that FP&L's sworn policy be included in the tariff as a remedy for FP&L's history of anticompetitive conduct and as part of the Commission's duty to implement this nation's antitrust laws. (See Commission's brief, p. 25).

We note that the Supreme Court in *Otter Tail* clearly held that a district court in an antitrust suit has the authority to require wheeling as a remedy. The authority of the Commission to order wheeling as an antitrust remedy, though, is more questionable.[25] The District of Columbia Circuit has suggested in dictum that the Commission may order wheeling based on specific showings of discrimination or anticompetitive activities by a utility. *Richmond Power & Light of Richmond, Indiana v. FERC*, 574 F.2d at 623. On the other hand, the Supreme Court in dictum has indicated that the Commission may not take action to remedy anticompetitive conduct when it lacks authority to take such action. In *FPC v. Conway Corp.* 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), the Court stated:

> The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it

[25] In noting that the Commission's authority to order wheeling as a remedy for alleged anti-competitive activity is open to some doubt, we are aware that the Commission has a duty to consider anticompetitive effects of activities requiring Commission approval.

> have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates.

426 U.S. at 276-77, 96 S.Ct. at 2003. Moreover, the Second Circuit in *New York Electric & Gas Corp.* suggested that the Commission may not order wheeling, in the absence of compliance with §§ 211 and 212, even upon a finding that a utility has engaged in anticompetitive activities in violation of antitrust policy.

In the instant case, however, we need not resolve the question as to what power the Commission may have to remedy antitrust violations, since we conclude that the Commission did not rely on this rationale. There can be little doubt that FP&L's business conduct in the past has not been exemplary in that it has been found to have engaged in a conspiracy with Florida Power Corporation to divide the wholesale power market in Florida. *Gainesville Utilities Department v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). But the Commission neither relied upon the anticompetitive findings in *Gainesville*, nor did it make any findings of anticompetitive activities or violations in orders on review. Instead, it relied upon the fact that FP&L possessed monopoly power over wholesale and retail markets in Florida, and that filing the tariff would have "procompetitive effects."

The Commission in the instant orders did refer to *Florida Power & Light Co.*, Opinion No. 57, 32 Pub.U.Rep. 4th [P.U.R.] 313 (Aug. 3, 1979), *appeal dismissed sub nom. Florida Power & Light Co. v. FERC*, No. 79-244 (D.C. Cir. April 25, 1980), an opinion issued with respect to Phase I of Docket No. ER78-19, *et al.*[26] The Commission noted that in Opinion No. 57, it had found certain proposed availability restrictions in FP&L's wholesale power tariff to have serious anticompetitive effects. It further noted that in Opinion No. 57, it had found FP&L to have monopoly power over wholesale and retail sales and that the

[26] *See* footnote 3, *supra*.

availability of interchange transmission service had a bearing on competitive relationships within the relevant markets. The Commission then reasoned in the orders on review that the presence of the policy statement in the tariff would have a definite procompetitive effect. While the reference to Opinion No. 57 indicates a concern over FP&L's dominance in the Florida markets, the Commission did not make any finding in the order on review that any specific anticompetitive activities or antitrust violations had occurred. Nor did the Commission find any antitrust violation in Opinion No. 57. Indeed, Opinion No. 57 was prefaced with this warning:

> The Commission acknowledges that it is not specifically responsible for enforcing the Sherman Act or any other of this nation's antitrust laws. *And we wish to emphasize that in evaluating the anti-competitive effects of a proposed rate change and in making findings with respect thereto, we do not make findings that violations of the antitrust laws have occurred.* Instead, it is our *obligation* to evaluate the public policies expressed in Federal antitrust laws and to reflect those policies in the conduct of our responsibilities under the Federal Power Act. This we have endeavored to do in the instant case.

(J.A., p. 2123, 32 P.U.R. 4 at 315, only first emphasis supplied, footnote omitted). The fact Opinion No. 57 concluded that FP&L had monopoly power and that the proposals there under review would have anticompetitive effects does not amount to a finding of any specific anticompetitive activity or of any antitrust violation.[27]

[27] Mere possession of market power without more such as an attempt to restrain trade or to monopolize, is not unlawful. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *Byars v. Bluff City News Co.,* 609 F.2d 843, 853 (6th Cir. 1979). The additional element may be an attempt to restrain trade or an attempt to monopolize, *ibid.,* findings not made by the Commission in the orders on review or in Opinion No. 57. Nor can an antitrust violation be found on the basis of a finding that a proposed wholesale

A close reading of the orders on review as well as Opinion No. 57 convinces us that the Commission did not issue the orders in question as a remedy.[28] Instead, as we read the orders, the Commission was attempting to foster competition in the Florida area. While we deem this a laudable goal, we conclude that, in the absence of findings of specific anticompetitive activities or antitrust violations, the Commission is without authority under the FPA to compel wheeling. We pretermit decision on whether the Commission has authority to compel wheeling as a remedy for specific findings of anticompetitive activities or antitrust violations.

D. Is FP&L Estopped from Changing Policy?

The Commission further reasoned that the policy statement by Mr. Bivans was given to rebut antitrust allegations made by the staff in Docket No. ER77-175 and that it was undoubtedly intended that the Commission would rely upon that statement in reaching a decision in that docket. The Commission concluded

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tariff would have an anticompetitive effect without a finding of anticompetitive intent or purpose. In a § 2 Sherman Act action for monopolizing, it is necessary to show that monopoly power has been coupled with a purpose or intent to exercise that power. *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

[28]Insofar as the Commission believed these orders would be appropriate remedies for anti-competitive activities or antitrust violations, it failed to make appropriate findings of such activities or violations. Nor did it provide any explanation as to how ordering this tariff filed, with its policy statement, would provide a remedy in order for us to ascertain the reasonableness of its action. In the orders on review, the Commission stated, "We also found [in Opinion No. 57] that the availability of interchange transmission services, at issue here, did not significantly diminish [FPL's monopoly] power; however, these services do have a bearing on competitive relationships within the relevant markets." (J.A. p. 2209.) If availability of interchange transmission does not significantly diminish FPL's monopoly power, this court is left with some question as to whether wheeling would be an appropriate antitrust remedy.

that FP&L could have anticipated nothing other than that the availability criteria would be given publication and effect.

Insofar as the Commission was relying upon a form of equitable estoppel, there is nothing in this record indicating that the Commission has relied upon FP&L's testimony. Among the many forms of equitable estoppel is the principle which imposes an obligation on a person to live up to his representations where inequitable consequences would result to persons having the right to rely, and who in good faith did rely, on the representation. *See Mitchell v. Aetna Casualty & Surety Co.*, 579 F. 2d 342, 348 (5th Cir. 1978). The Commission has not rendered its final decision in Docket No. ER77-175. We do not even know whether the Commission has given credence to Mr. Bivans' testimony.

Nor do we understand the Commission's conclusion that FP&L could have anticipated nothing other than that the policy would be published and given effect. Under the FPA, FP&L could reasonably have anticipated that it could choose, absent any violation of the antitrust laws or § 205(b), to whom it would wheel power. Accordingly, when it gave its testimony, it could assume that it could interpret, and even alter, its policy of availability without prior approval from the Commission. Such an assumption does not indicate untruthfulness on the part of Mr. Bivans or any bad faith by FP&L. There is nothing in the record to indicate that FP&L was being anything other than completely truthful in its testimony.[29]

For the foregoing reasons, we REVERSE.

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[29]Commission's counsel cites several cases for the proposition that regulatory agencies may bind parties to representations made in support of requests for relief. We find all these cases distinguishable. In *United States v. Chesapeake & Ohio Railway Co.*, 426 U.S. 500, 96 S. Ct. 2318, 49 L.Ed.2d 14 (1976), railroads justified requests for tariff increases on the ground that certain capital and maintenance expenses were needed. The Supreme Court held that the Interstate Commerce

Commission ("ICC"), as an adjunct to its power to suspend and investigate increases, could condition the immediate implementation of the rate increase without investigation on the railroads devoting the increase to the specified capital and maintenance expenses. While the Court gave as one reason for its decision the representation by the railroads, the decision was grounded on the ICC's powers under its authority to suspend and investigate increases. In the three other cases cited, the representations were made as specific inducements to obtain agency relief. In *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 75 S.Ct. 467, 99 L.Ed. 583 (1955), a company proposing a merger voluntarily proposed as a condition for approval of the merger a specified allocation of costs. The FPC included this condition in its certificate of public convenience and necessity approving the merger. In *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F.Supp. 353 (D.Col)(three judge panel), *aff'd per curiam*, 404 U.S. 802, 92 S.Ct. 51, 30 L.Ed. 2d 37 (1971), the ICC granted the parties an extension of time on a hearing with respect to rates on condition that if the rates were found unjust and unreasonable, a refund would be made for the extended period. The carriers first objected to this condition, but then acceded to it in order to obtain the extension in time. In *Amoskeag Co. v. ICC*, 590 F.2d 388 (1st Cir. 1979), a company began acquiring stock in a railroad. When objections were made concerning the acquisition of the stock, the company made an express oral and written commitment to the ICC to refrain from purchasing stock in exchange for which the company obtained the names of stockholders of the railroad.

APPENDIX H

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

January 22, 1982

TO ALL PARTIES BELOW:

No. 80-5259

FLORIDA POWER & LIGHT COMPANY

vs.

FEDERAL ENERGY REGULATORY COMMSSION

(FERC Nos. ER78-19, *et al.)*

This is to advise that orders have this day been entered denying all the petition(s) for rehearing.

- ☐ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petititon ( ) for rehearing en banc has also been denied.
- ☐ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,
NORMAN E. ZOLLER, Clerk

By: _____
Rosa Kushner, Deputy Clerk

cc: Jerome M. Feit, Esq.
Robert T. Hall, III, Esq.
Robert A. Jablon, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-5259

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review of an Order of the Federal Energy Regulatory Commission

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 6, 5 Cir., 1981, _____ F.2d _____)

[Filed January 22, 1982]

Before HENDERSON, ANDERSON and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of themembersof the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-5259

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review of an Order of the Federal Energy Regulatory Commission

ON PETITIONS FOR REHEARING
[Filed January 22, 1982]

Before HENDERSON, ANDERSON and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson, III
United States Circuit Judge

*Former Fifth Circuit Case: (Section 9(1) of Public Law 96-452-10/14/81)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-5259

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review of Orders of the
Federal Energy Regulatory Commission

ON PETITION FOR REHEARING

[Filed January 22, 1982]

Before HENDERSON, ANDERSON AND SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

R. Lanier Anderson, III

*Former Fifth Circuit Case: (Section 9(1) of Public Law 96-452-10/14/81)

APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Jerome M. Feit, Esq.
Solicitor
Federal Energy
Regulatory Commission
825 N. Capitol St., N.E.
Washington, D.C. 20426

February 3, 1982

No. 80-5259

FLORIDA POWER & LIGHT COMPANY

vs.

FERC

(FERC Nos. ER78-19, *et al.*)

[CORRECTED]

Dear Mr. Feit:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

( ) Original record on appeal or review.

( ) Original Exhibits.

(X) Bill of Costs approved by this Court.

Sincerely,
Gilbert F. Ganucheau, Clerk

By_____
June Phillips, Deputy Clerk

Encl.
cc:
Letter only w/Bill of cost
Robert T. Hall, III, Esq.
Robert A. Jablon, Esq.
Frank A. Kreidler, Esq.
Robert F. Shapiro

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-5259

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review from an order of the Federal Energy Regulatory Commission

(D.C. Docket No.: FERC Nos. ER78-19, *et al.*)
[CORRECTED]

Before HENDERSON, ANDERSON and SAM D. JOHNSON, Circuit Judges.

This cause came on to be heard on the petition of the Florida Power and Light Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission, in this cause be, and the same is hereby, reversed.

IT IS FURTHER ORDERED that the City of Gainesville, City of Starke, City of Homestead, City of Kissimmee, City of St. Cloud, City of Key West, City of Tallahassee, The Ft. Pierce Utilities Authority, The Lake Worth Utilities Authority, The New Smyrna Beach Utilities Commission and the Sebring Utilities Commission pay the costs on appeal to be taxed by the Clerk of this Court.

November 6, 1981

ISSUED AS MANDATE: [February 3, 1982]

*Former Fifth Circuit Case, § 9(1) of Public Law 96-452, Oct. 14, 1980.

APPENDIX J

THE SETTLEMENT AGREEMENT
[excerpts]

This agreement is dated as of March 3, 1982 by and between Florida Power & Light Company ("FPL") and the following Florida cities, commissions or authorities: The City of Alachua, The City of Bartow, The City of Fort Meade, The City of Homestead, The Utility Board of the City of Key West, The City of Kissimmee, The Lake Worth Utilities Authority, The City of Leesburg, The City of Mount Dora, The City of Newberry, The New Smyrna Beach Utilities Commission City of New Smyrna Beach, The Sebring Utilities Commission, The City of Starke, The City of St. Cloud, The City of Tallahassee, The City of Vero Beach, and the Florida Municipal Utilities Association ("Cities" or "Nuclear Intervenors Group").

WITNESSETH

Whereas, FPL and Florida Municipal Power Agency ("FMPA") are entering into a Financing Contigency Agreement in the form attached hereto as Appendix A;

Whereas, the parties to this Agreement are settling differences between them and establishing additional arrangements for their mutual benefit,

NOW THEREFORE, the parties mutually agree as follows:

• • •

7. FPL agrees to cooperate, by providing transmission data available to FPL, in any study proposed to the Florida Electric Power Coordinating Group ("FCG") within one year after the date of this Settlement Agreement of lawful alternative arrangements for transmission service in Florida. At the time any such study is instituted, FPL shal determine whether it will pay any of the expected cost of the study and shall promptly advise FCG of its determination. At the conclusion of the study, FPL and each other utility will determine independently whether to accept any recommendation made on the basic of matters studied by FCG. If FPL determines not to accept any such

recommendation, FPL agrees not to oppose consideration by the Florida Public Service Commission ("FPSC") of the recommendation, if any, made on the basis of matters studied by FCG, but FPL reserves the right to take any position it deems appropriate before the FPSC on the merits of such recommendation, and to exercise its legal rights with respect to any determination made by the FPSC.

8. (a) FPL agrees that it will provide transmission service to FMPA for 77 Mw of power from a point or points of interconnection between FPL and Georgia Power Company (or Southern Companies) to FMPA members whose systems are directly interconnected or connected with FPL's system, provided that FPL shall be required to deliver such power only to those points of interconnection or delivery as to which sufficient capacity is available to accommodate the transaction. Except as provided below, this service shall be available only for transmission of the output of an interest that FMPA acquires in the Vogtle plants. FMPA may accept such service by entering, before June 1, 1983, into a contract with FPL that provides the rate and terms and conditions for such service and commits FMPA to pay for such service, whether or not it is used, for the term of the contract, which term may be designated by FMPA. Such contract shall not provide for service to commence earlier than one year after the effective date of the contract. If FMPA has not, by June 1, 1983, contracted for an interest in the Vogtle plant, it may receive such transmission service for power from another source designated by it if it enters into such a contract before June 1, 1984.

(b) FPL agrees that, beginning with the date of completion of its two 500 Kv lines from the Duval substation to the Martin Plant (currently estimated to be January 1, 1986), it will make available to FMPA transmission service for up to 300 Mw of power (in addition to the 77 Mw provided in Section 8(a)), with such amount to be determined by FMPA, from the Duval substation to points of interconnection or delivery on FPL's system south of the Duval substation designated by FMPA,

provided that FPL shall be required to deliver such power only to those points of interconnection or delivery as to which sufficient capacity is availale to accommodate the transaction. FMPA may accept such service by entering, before January 1, 1986, into a contract with FPL that provides the rate and terms and conditions for such service and commits FMPA to pay for such service, whether or not it is used, for the term of the contract, which term may be designated by FMPA. Such contract shall not provide for service to commence earlier than one year after the effective date of the contract. If construction by FPL is necessary for transmission service requested by FMPA, FPL may require reasonable financial arrangements in the manner provided by License Condition X(d). FMPA shall be responsible for arrangements to deliver any such power to FPL at the Duval substation.

(c) The contracts for transmission service described in Sections 8(a) and 8(b) shall contain terms that are consistent with the terms of this Section 8(c). FPL and FMPA will negotiate and attempt to agree on the rates and other terms and conditions to be included in the contracts. In the event of a disagreement, the rates and such terms and conditions proposed by FPL will be included in any such contract, andthe contract will provide that (i) FMPA may contest such rates and terms and conditions, and (ii) to the extent that the rates provided in the contract are ultimately found, by an order of the FERC no longer subject to appeal, to be excessive, FPL will refund the excess together with interest at the rate specified for refunds by the FERC's regulations. FPL shall have the right unilaterally to make application to the FERC, or other regulatory authority having jurisdiction, for a change inthe rates and terms and conditions provided in the contracts except for the terms and conditions specified in this Section 8(c). All rights provided to FMPA by this Section 8(c) shall terminate if, and to the extent that, FMPA fails to enter into the contracts described above by the dates specified above. This Section 8(c) shall not be construed to restrict the ability of FMPA otherwise to seek transmission service from FPL, or to commit FPL to provide such service other than as specified herein.

9. FPL agrees to offer, to each City with which it is party to a transmission service agreement that applies to transactions, such as emergency interchange, short-term firm interchange, economy interchange, and firm interchange, under one or more interchange agreements (and to FMPA, at such time as FMPA and FPL enter into any such transmission service agreement), the opportunity to pay for such service on a dollars per megawatt-hour basis, as contrasted with a rate expressed in dollars per megawatt-day, dollars per megawatt-month or dollars per megawatt-year. It is contemplated that the rate per megawatt-hour would be determined by dividing the applicable rate, expressed in terms of dollars per megawatt-year, by 8,760. Customers under such agreements may reserve transmission capacity for interchange transactions by committing to pay the per megawatt-hour transmission rate for each hour of the period so reserved, provided FPL commits, in accordance with the effective transmission service agreement, to the availability of such services for such period. Where a City has notified FPL that it has a need for transmission service during a designated period by reason of entering into a power transaction agreement with another utility for such period, which agreement shall have been delivered to FPL prior to the commencement of such period, but such City does not wish to reserve transmission capacity during such period, but contracts with FPL for service on a per megawatt-hour basis, then if FPL receives a request from another customer for firm transmission service, which service cannot be reliably provided without risk of interruption of service to such City, FPL shall notify such City and offer it the right of first refusal to reserve the transmission capacity necessary for the interchange transaction for which it has contracted on a per megawatt-hour basis. The per megawatt-hour rate shall not apply to any transaction the term of which is longer than three years. Nothing contained in this Section 9 shall be construed as affecting in any way the right of FPL to unilterally make application to the FERC, or other regulatory authority having jurisdiction, for a change in any rate schedule for transmission service under Section 205 of the Federal Power

Act and pursuant to the FERC's Rules and Regulations promulgated thereunder; provided that FPL will not, prior to January 1, 1987, put into effect any change that eliminates the per megawatt-hour pricing concept described herein, until the FERC has first issued an effective order approving FPL's application to eliminate this pricing concept.

• • •

13. (a) Concurrently with the payment provided for in Section 12, (1) FPL and those Cities which are parties to *Lake Worth Utilities Authority et al. v. FPL*, S. D. Fla., No. 79-5101-Civ-JLK, shall enter into a stiplation, in the form attached hereto as Exhibit A, dismissing such litigation with prejudice and requesting that the Court vacate as moot its "Order Denying Motions for Summary Judgment on Plaintiff's Gas Claim and Granting Defendant's Summary Judgment Motion on Plaintiff's Nuclear Access Claim," dated October 9, 1981, (2) each of the Florida Cities shall provide to FPL an executed covenant not to sue, in the form attached hereto as Exhibit B, (3) FPL shall provide to the Florida Cities an executed covenant not to sue, in the form attached hereto as Exhibit C, and (4) Florida Cities shall withdraw their request for a Section 105a hearing before the NRC in Docket Nos. 50-250A, 50-251A, 50-335A, and 50-389A, and dismiss their appeal in the Section 105a matter before the United States Court of Appeals for the District of Columbia Circuit (No. 80-1099) in the form of the documents attached hereto as Exhibit D, and (5) a motion shall be filed, in the form attached hereto as Exhibit E, in which (i) Florida Cities advise the Nuclear Regulatory Commission that they accept the settlement License Conditions which became effective April 27, 1981, in NRC Docket Nos. 50-389 and 50-389A, and request that they be permitted to withdraw from those proceedings, and (ii) Florida Cities and FPL request that those proceedings be terminated without further litigation or other action and that the "Memorandum and Order Concerning Florida Cities Motion for Summary Disposition on the Merits," issued by the Atomic

Safety and Licensing Board in NRC Docket No. 50-389A on December 11, 1981, be vacated as moot.

(b) Each of the Florida Cities agrees (1) not to seek directly or indirectly or take advantage of any relief (other than enforcement of the License Conditions) from the NRC and (2) not to assert or continue to maintain before any forum any matters alleged by any of the Florida Cities in any of the litigation and proceedings identified in subsection (a) above.

14. Florida Cities and FPL shall cooperate in attempting to secure the consent of the FERC and any other party in order to vacate the judgment in *Florida Power & Light Company v. FERC*, 660 F.2d 668 (5th Cir. 1981), and the FERC order that was the subject of that judgment on the grounds that the controversy among the parties to those proceedings with respect to the filing of a transmission tariff has been mooted. Subject to Florida Cities' obligations under Section 13 of this Settlement Agreement and the covenants not to sue referred to in such section, Florida Cities reserve the right to litigate matters relating to FPL's rates for transmission service, except that Florida Cities may not seek any order in any pending FERC proceeding requiring FPL to file a tariff for transmission service.

15. Each of the signatories which is an authority, board or commission separate from the city in Florida in which it operates an electric utility system (*e.g.*, the Lake Worth Utilities Authority, the Utilities Commission of New Smyrna Beach, the Sebring Utilities Commission, and the Utilities Board of the City of Key West) represents and covenants that its approval of the Settlement Agreement will bar that City from asserting against FPL any claim or matter that (a) said authority, board or commission may not assert by reason of the Settlement Agreement and the Appendices and Exhibits thereto and/or (b) the City could not, after the Settlement Agreement, assert against

FPL were it a party to the Settlement Agreement and the Appendices and Exhibits thereto.

ATTEST: FLORIDA POWER & LIGHT COMPANY

_____

J. T. Blount, Assistant Secretary

_____

R. Gardner, Sr. V. P.

Date: Feb. 16, 1982

There follow 17 signature pages, one for each of the City parties to this Settlement Agreement.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 79-5101-Civ-JLK

THE LAKE WORTH UTILITIES AUTHORITY,
THE UTILITIES COMMISSION OF NEW SMYRNA BEACH,
THE SEBRING UTILITIES COMMISSION;
AND THE CITIES OF
ALACHUA, BARTOW, FORT MEADE, HOMESTEAD,
KISSIMMEE, MOUNT DORA, NEWBERRY, ST. CLOUD,
STARKE and TALLAHASSEE, FLORIDA,
Plaintiffs,

v.

FLORIDA POWER & LIGHT COMPANY,
Defendant.

(AMENDED ORDER OF DISMISSAL)

This matter having come before the Court pursuant to a joint Stipulation of the parties, and the Court having considered the Stipulation and the record in this matter, having been informed that a final settlement between the parties has been consummated, and being otherswise fully advised in the premises, it is hereby...

ORDERED and ADJUDGED that the above-styled action be, and hereby is, dismissed with prejudice, each party to bear its own costs; and it is...

FURTHER ORDERED and ADJUDGED that the Court's October 9, 1981 Order Denying Motions For Summary Judgment On Plaintiff's Gas Claim And Granting Defendant's Summary Judgment Motion On Plaintiff's Nuclear Access Claim be, and hereby is, vacated as moot.

DONE and ORDERED in Chambers at the United States Courthouse, Miami, Dade County, Florida this [23] day of March, 1982.

James Lawrence King
U.S. District Judge

cc:
Alvin B. Davis, Esq.
Joseph C. Jacobs, Esq.
Alan J. Roth, Esq.
Daniel Guttman, Esq.
Marta Manildi, Esq.
Joseph Van Eaton, Esq.
J. A. Bouknight, Esq.
Herbert Dym, Esq.
Robert A. Jablon, Esq.

APPENDIX L

Cite as 15 NRC 639 (1982) **LBP-82-21**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo

In the Matter of **Docket No. 50-389A**

FLORIDA POWER & LIGHT COMPANY
(St. Lucie Plant, Unit No. 2) **March 24, 1982**

In light of a comprehensive settlement agreement among the parties, the Licensing Board grants the joint motion of applicant and intervenors to dismiss the proceeding.

ANTITRUST PROCEEDING: JURISDICTION OF LICENSING BOARD

Once the Attorney General of the United States has withdrawn from the proceeding and permission has been granted to the remaining intervenors to withdraw, the Board no longer has jurisdiction to entertain an antitrust proceeding under the provisions of the Atomic Energy Act.

APPEARANCES

J.A. Bouknight, Esq. and Herbert Dym, Esq. for Florida Power & Light Company.

Robert A. Jablon, Esq., Alan J. Roth, Esq., Daniel Guttman, Esq. and Marta Manildi for Florida Cities, intervenors.

Ann Hodgdon, Esq. and Benjamin Vogler, Esq. for the Nuclear Regulatory Commission Staff.

Lynn Bregman, Esq. for Parsons & Whittemore, Inc., *et al.*, *amicus curiae*.

MEMORANDUM AND ORDER
(Concerning Motions to Dismiss, Terminate and Vacate)

Florida Power & Light Company (FPL) has entered into a comprehensive settlement agreement with Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Homestead, Key West, Kissimmee, Leesburg, Mount Dora, Newberry, St. Cloud, Starke, Tallahassee and Vero Beach, Florida, and the Florida Municipal Utilities Association (Cities). Pursuant to that agreement, on March 10, 1982, FPL and Cities filed a Joint Motion to Withdraw Interventions, Dismiss and Terminate Proceedings, and Vacate Memorandum and Order. On the same day, Cities also filed a Withdrawal of Request for Hearing.

These motions are opposed by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (collectively RRD) as *amicus curiae (letter of March 15, 1982), a status to which RRD was admitted by Board orde, affirmed in a footnote of an appeals board decision, LB-81-19, 14 NRC 87, 96 (1981); compare* LBP-81-28, 14 NRC 333, 346 (1981) (invitation withdrawn); *but see* ALAB-665, 15 NRC 22, 35 (footnote 19, paragraph 2)(RRD has been granted *amicus* status).

I. DISMISSAL

FPL and Cities argue that their Settlement Agreement should be accepted as a basis for dismissing this case. They state, correctly, that an antitrust proceeding is not required by statute and occurs only if a party has intervened or the Attorney General of the United States advises that a proceeding is required, under Section 105c(5) of the Atomic Energy Act. Consequently, an antitrust proceeding is in the nature of an operating license proceeding and it ordinarily is appropriate to terminate such a proceeding when all admitted intervenors have withdrawn. *In the Matter of Georgia Power Company (Edwin I. Hatch Nuclear Power Plant, Unit No. 2),* LBP-74-52, 8 AEC 107 (1974); *see also In the Matter of Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Plant, Units 1 & 2),* LBP-73-15, 6 AEC 375, 377 (1973).

In its letter as *amicus* RRD does not oppose the argument presented to us about the nature of our jurisdiction, and that unopposed argument appears to us to be correct. We therefore conclude that our jurisdiction depends on the presence in the proceeding of either the Attorney General of the United States or of an intervenor. Since RRD has been denied status as an intervenor and since the Attorney General withdrew pursuant to a prior settlement agreement (*see* our Memorandum and Order, April 24, 1981, unpublished), there seem to be no parties before us and we seem to lack jurisdiction. (*See* Section II of this decision, formally dismissing two parties that are not part of the settlement agreement but that sought to withdraw from this case earlier.)

Despite our apparent lack of jurisdiction, we have reviewed the settlement documents to see whether there is any lack of fairness. *See* 10 CFR §2.759 (encouraging fair and reasonable settlements). A reason we undertook that review was that the Atomic Energy Act anticipates that we will apply the purposes of the antitrust laws, and courts acting pursuant to those laws have jurisdiction to approve or disapprove proposed settlement agreements under the Tunney Act (the Antitrust Procedures and Penalties Act of 1974). *See U.S.* v. *American Telephone and Telegraph Co., et al.*, U.S. District Court, District of Columbia, Case No. 74-1698 (D.D.C.) 1982-1 *Trade Cases* ¶64,465 (January 12, 1982) at 72,610-611. However, that act has only suggestive authority here, and our review of the settlement agreement failed to disclose any egregious unfairness; hence, we have decided not to pursue further, on our own motion, the question of whether the proposed settlement is in the public interest. *Compare* Clayton Act, 15 U.S.C. §5.(b). In this case, consideration by us of whether the settlement is in the public interest seems particularly unnecessary both because there was an earlier settlement approved in this case after notice of the agreement was given to the public and because the settlement before us also is before a federal district court, which will approve or disapprove of the settlement pursuant to principles which differ little from those we would apply. (Were the court to reject the settlement, we might then need to reconsider our decision to dismiss the proceeding.)

We are not impressed by RRD's argument that our prior decisions provide it with a right to contest the remedies to be made available in this case and that our own decisions therefore stand in the way of accepting this settlement. First, we note that the Appeal Board affirmed our finding that RRD has failed to show that its complaint has a nexus to this proceeding. ALAB-665, 15 NRC 32-33 (1982). The principal deficiency in

its case is that it failed to show that the activities for which a license is sought would "play an active role in creating or maintaining the anticompetitive situation." *Id.* at 32.

We reject RRD's complaint that "the Board's grant to Parsons & Whittemore of status to participate at the remedial stage of the proceedings as *amicus curiae* could have served no useful purpose." First, our grant of *amicus* status gave RRD the opportunity to demonstrate that we should not accept the settlement placed before us in this case. Second, the grant of *amicus* status anticipated a continuing contest over the appropriate relief to be granted in this case; and *amicus* status would under those circumstances have provided an opportunity for RRD to attempt to affect the Board's decision to its advantage. That RRD has been unable to use its *amicus* status to advance its underlying interests does not demonstrate that the initial grant "could have served no useful purpose."

For these reasons, the motion to dismiss is granted.

II. EARLIER MOTIONS TO WITHDRAW

The Orlando Utilities Commission moved to withdraw from this proceeding on June 20, 1980 and the Gainesville Utilities Department moved to withdraw on August 4, 1981. Since there are no reasons to refuse these motions, they are granted.

III. MOTION TO VACATE

FPL and Cities have requested that our Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits, dated December 11, 1981 (LBP-81-58, 14 NRC 1167) should be vacated. They argue by analogy to established federal practice that when an appeal becomes moot it is appropriate to vacate the trial court's decision. *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950).

We accept this argument as valid. Moreover, our decision of December 11, 1981, was tentative, being left open by us for further objection by the parties. Given the preliminary nature of that opinion and the agreement of the parties not to contest it, that opinion ought to be vacated. It is our duty to adjudicate disputes and not to stand in the way of settlements by refusing a reasonable request to vacate our order.

ORDER

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 24th day of March, 1982,

ORDERED

(1) The motions to withdraw from this proceeding filed on June 20, 1980, by the Orlando Utilities Commission and on August 4, 1981, by the Gainesville Utilities Department, are granted.

(2) Our Memorandum and Order of December 11, 1981, (LBP-81-58) is vacated.

(3) This proceeding is dismissed.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Michael A. Duggan
ADMINISTRATIVE JUDGE

Robert M. Lazo
ADMINISTRATIVE JUDGE

Bethesda, Maryland

APPENDIX M

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FORT PIERCE UTILITIES AUTHORITY, *et al.*

vs.

FLORIDA POWER & LIGHT COMPANY

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH (FORMER FIFTH) CIRCUIT

In *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668 (5th Cir. 1981), the former Fifth Circuit held that the Federal Energy Regulatory Commission ("FERC" or "Commission") had acted beyond its jurisdiction in ordering Florida Power & Light Company ("FPL") to file a generally applicable tariff for transmission service, and in seeking to accomplish the same result by requiring FPL to file any policy of transmission availability as a practice. Florida Cities,[1] intervenors below, request this Court to extend the time for filing petitions for *certiorari* for sixty (60) days until June 21, 1982.

---

[1]Florida Cities include the Cities of Gainesville, Homestead, Key West, Kissimmee, Starke, St. Cloud and Tallahassee, Florida, and the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission. These cities are municiapl authorities. They each own or operate independent electric systems. They each have an interest in the terms under which transmission services are made available by FPL.

[2]FPL is a public electric utility, serving customers throughout eastern and southern Florida.

This case could present important issues concerning the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act, 16 USC §§ 791a *et seq.* However, the parties at interest, FPL and Florida Cities, have reached a broad antitrust settlement. It is anticipated that the FERC Staff will agree to join the Cities and FPL in recommending to the FERC a settlement of matters before the FERC that would moot the controversy that underlies this case and that, accordingly, would negate any need for Supreme Court review. Such agreement may be reached tomorrow. If the FERC acts favorably on the settlement, the Cities and FPL would support a FERC motion to the Fifth Circuit to vacate its judgment in *Florida Power & Light Company v. FERC,* 660 F.2d 668 (5th Cir. 1981), on the ground that the underlying controvesy among the parties is moot. Under the reasoning of *United States v. Munsingwear,* 340 U.S. 36 (1950), *Black v. Amen,* 355 U.S. 600 (1958), *A. L. Mechling Barge Lines v. United States,* 368 U.S. 324 (1961), and *Amalgamated Clothing and Textile Workers Union v. J. P. Stevens & Co.,* 638 F.2d 7, 8 (2nd Cir. 1980), where there is a settlement which moots underlying issues in a case under or subject to review, the decisions below should be vacated.

However, in order to preserve the jurisdiction of this Court, the parties request the grant of this motion for an extension of time. This will permit the FERC to consider the settlement, and the Fifth Circuit to consider any motion to vacate its judgment.

JURISDICTION

The judgment of the Court of Appeals was entered November 6, 1981. Timely petitions for rehearing were filed by respondent Federal Energy Regulatory Commission and intervenor Florida Cities. Florida Cities also filed a Suggestion for Rehearing En Banc. These petitions and suggestion were denied on January 22, 1982.

This Court has jurisdiction under 28 U.S.C. §1254(1), and 313(b) of the Federal Power Act, 16 U.S.C. §8251(b). Jurisdiction is also invoked pursuant to Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

ARGUMENT IN SUPPORT OF THE MOTION

The parties submit that their motion should be granted for the following reasons:

1. The grant of the time extension will permit the Commission to take any necessary actions in light of the parties' settlement. If the Commission acts favorably on the settlement proposal, it is contemplated that it would move the Fifth Circuit to vacate its judgment on the ground that the underlying controversy among the parties is moot. Granting of such motion would obviate any need for any party to apply for a writ of *certiorari*.

2. The grant of the motion will preserve the jurisdiction of this Court as may be necessary.

3. The standards of this Court's Rule 29.2 for motions of extensions within the final ten (10) day period have been met. A settlement between FPL and the Commission staff is in the process of final negotiations. Therefore, this motion was not filed earlier. The grant of the motion would serve the public interest and injure no party. All parties have an interest in settlement of these matters. Indeed, it is long established FERC policy to favor settlements. *E.g., Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *United Gas Pipeline Co.*, 20 FPC 349, 353 (1958). No party objects to the grant of the extension, and the undersigned are authorized to represent that FPL, the only remaining party to the proceedings below, supports the grant of the relief requested herein.

Respectfully submitted,

Robert A. Jablon
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

Attorney for the Cities of Gainesville, Homestead, Key West, Kissimmee, Starke, St. Cloud and Tallahassee, Florida, and the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission.

April 22, 1982

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH (FORMER FIFTH) CIRCUIT in accordance with Rule 28 of the Supreme Court of the United States. Service was made by mail to the following parties:

Floyd L. Norton
Reid & Priest
1111 19th Street, N.W.
Washington, D.C. 20006

Robert Shapiro
Office of the Solicitor
Federal Energy Regulatory
Commission
825 North Capital Street, N.E.
Washington, D.C. 20426

J.A. Bouknight, Esq.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Robert A. Jablon
Attorney for the Cities of Gainesville, Homestead, Key West, Kissimmee, Starke, St. Cloud and Tallahassee, Florida, and the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission.

SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH (FORMER FIFTH) CIRCUIT in accordance with Rule 28 of the Supreme Court of the United States. Service was made by hand to the office of:

Rex E. Lee
Solicitor General
Department of Justice
Room 5614
10th and Constitution Avenue, N.W
Washington, D.C. 20530

Robert A. Jablon

Attorney for the Cities of Gainesville, Homestead, Key West, Kissimmee, Starke, St. Cloud and Tallahassee, Florida, and the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission.

April 23, 1982

APPENDIX N

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

April 26, 1982

Robert A. Jablon, Esq.
Spiegel and McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

RE: *Fort Pierce Utilities Authority, et al. v. Florida Power & Light Company,* A-905.

Dear Mr. Jablon:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Powell who, on April 23, 1982, signed an order extending your time to and including June 21, 1982.

A copy of the Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

BY _____

Robert W. Kuhn
Assistant Clerk

encl.
cc (letter only):

Honorable Rex. E. Lee
Floyd L. Norton, Esq.
J.A. Bouknight, Esq.
Norman E. Zoller, Esq., Clerk, US Court of Appeals for the Eleventh Circuit (Your No. 80-5259)

Supreme Court of the United States

No. A-905

FORT PIERCE UTILITIES AUTHORITY, ET AL.,
Petitioners,

v.

FLORIDA POWER & LIGHT COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 21, 1982.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme
Court of the United States

Dated this 23rd
day of April, 1982

APPENDIX O

Florida Power & Light Company, Docket Nos. ER77-175-000 and ER78-19-000 (Phase), *et al.*

Order Accepting and Adopting Revised Offer of Settlement

Issued June 17, 1982

Before Commissioners: C.M. Butler III, Chairman; Georgiana Sheldon and A.G. Sousa.

[Note: This order acts on the Initial Decision on Proper Charges for Transmission of Electric Power, issued November 28, 1978, appearing at 5 FERC ¶ 63,025, and the Initial Decision of the Administrative Law Judge, issued July 24, 1980, appearing at 12 FERC ¶ 63,014.]

I.

On June 10, 1982, Florida Power & Light Company (FP&L) filed a Revised Offer of Settlement with the Commission. The Revised Offer would resolve all issues in this proceeding, except for certain issues concerning the appropriate rates for transmission service. The Revised offer meets the objections to a previous Offer of Settlement, considered by the Commission on May 26, 1982. Accordingly, the Revised Offer of Settlement, as discussed below, will be approved and adopted.

II.

Beginning in 1977, FP&L has tendered for filing a number of transmission service agreements between itself and individual Florida cities. These agreements became the subject of various Commission proceedings.

The first such proceeding concerns a transmission service agreement between FP&L and the City of New Smyrna Beach. *Florida Power & Light Co.*, Docket No. ER77-175-000. FP&L filed a proposed agreement with the Commission on January 28, 1977. Both the City and the staff argued that FP&L should have

filed a general transmission tariff rather than an individual agreement, based on claims under the antitrust laws and policies, and raised various issues concerning appropriate rates for the service. On November 28, 1978 [5 FERC ¶63,025], the presiding administrative law judge issued an Initial Decision, denying the request for a transmission service tariff and ruling on the rates issues. The staff and the city filed exceptions to this decision on January 2, 1979, and Commission action in this docket is still pending.

FP&L has also entered into a number of transmission service agreements ("TSAs") with other Florida cities under which FP&L provides transmission service for interchange transactions between such cities and other utilities with which they have entered into interchange agreements. These TSAs agreements all were consolidated with Docket No. ER78-19-000 (Phase II) or made subject to its outcome, because the transmission rates in the various agreements were based on FP&L's cost of service study in that docket.[1] The cities and the staff raised various objections to FP&L's TSAs, including contentions that FP&L should be required to file a tariff applicable to interchange transmission service availability policy. In this docket (ER78-19-000 (Phase II)), the administrative law judge, in an Intitial Decision of July 24, 1980 [12 FERC ¶63,014], ordered FP&L to file a single tariff rather than individual TSAs, to include in the tariff certain policy

[1]Docket No. ER78-19-000 originated when FP&L filed proposed rate increases and tariff modifications applicable to full requirements and partial requirements wholesale customers under FP&L's FPC Electric Tariff, First Revised Volume No. 1. Phase I involved the proposed tariff changes, as well as a notice of cancellation of firm partial requirements service to the City of Homestead, subsequently consolidated with this docket. The Commission rejected FP&L's Phase I proposal in Opinion No. 57 [8 FERC ¶ —]. The wholesale rate issues that were scheduled for consideration in Phase II were resolved by settlement (letters from Kenneth Plumb notifying FP&L that SR-2 and PR settlements were accepted by the Commission (December 5, 1979, February 7, 1980)). Consequently, proceedings in Phase II have focused solely upon the TSAs.

statements of transmission service availability, and to modify certain terms and conditions of transmission service. The judge also ruled on various issues concerning the appropriate rates for interchange transmission service. All the parties filed exceptions to this decision on September 16, 1980, and Commission action is pending.

During the course of the proceedings in Docket No. ER78-19-000 (Phase II), the staff filed a motion with the Commission, on June 6, 1978, requesting that FP&L be ordered to include in its transmission service agreements a statement on transmission service availability which FP&L had submitted to the Commission in prepared testimony in Docket No. ER77-175-000. On December 21, 1979, in Docket No. ER78-19-000, the Commission ordered FP&L to file a tariff in place of individual TSAs and to include in its tariff the policy statement referenced in the staff motion. FP&L filed an application for clarification and rehearing of this order on January 21, 1980. On February 6, 1980 [10 FERC ¶61,108], rehearing was denied. On April 3, 1980, FP&L petitioned the U.S. Court of Appeals for the Fifth Circuit for review of the Commission's December 21, 1979 and February 6, 1980 orders. *Florida Power & Light Company v. F.E.R.C.*, No. 80-5259 (660 F.2d 668 (1981)).

In accordance with its position in Docket No. ER78-19-000, FP&L subsequently filed, by letters dated May 21, May 28 and June 3, 1980, amendments both to its transmission service agreements and, under protest, to its transmission tariff. The Commission accepted the amendment to the tariff but rejected the amendments to the transmission service agreements, in an order issued July 22, 1980 [12 FERC ¶61,055], in Docket Nos. ER80-411, ER80-417 and ER80-438. The Commission then terminated all three of these dockets. FP&L applied for a rehearing of this order on August 21, 1980. Rehearing was denied by the Commission without opinion. FP&L then appealed the order of July 22 to the Fifth Circuit. *Florida Power & Light Company v. F.E.R.C.*, No. 80-5922. This case was held in abeyance by the Fifth Circuit pending the outcome of No.

80-5259, and is now pending before the U.S. Court of Appeals for the Eleventh Circuit.

On November 6, 1981, the Former Fifth Circuit issued a decision in No. 80-5259, 660 F.2d 668, reversing the Commission's orders of December 21, 1979, and February 6, 1980.[2] Any petition for *certiorari* was required to be filed with the Supreme Court by April 22, 1982. The cities, however, have obtained an extension of this deadline and have requested a further extension, so that the Commisison could have an opportunity to act on the Revised Offer of Settlement presented herein.

In March 1982, FP&L and the cities entered into a comprehensive settlement of differences which have been the subject of litigation in the above and other non-Commission proceedings. The March comprehensive settlement, *inter alia*, affected issues before the Commission in the instant dockets, including the availability of transmission service from FP&L and the operation of antitrust laws and policies. The March comprehensive settlement has not been field with the Commission. However, it did result in the submittal to the Commission by FP&L of first one (April 29) and now another (June 10) Offer of Settlement addressing only the foregoing Commission-related issues. The Commission voted at its May 26, 1982 public meeting to reject the April Offer of Settlement. Now FP&L has placed before the Commission its June Revised Offer of Settlement. It is the Revised Offer which the Commission by this order will accept and adopt, as discussed below.

III.

The Revised Offer of Settlement, like the April Offer of Settlement, is uncontested[3] and would resolve all of the issues in

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[2] *Florida Power & Light Company v. F.E.R.C.*, 660 F.2d 668 (5th Cir., 1981). The Commission and Florida Cities filed separate petitions for rehearing with the Former Fifth Circuit which were denied on January 22, 1982.

[3] All active parties in this proceeding have indicated their agreement or, in the case of Florida Power Corporation, acquiescence to the Revised Offer of Settlement. Accordingly, the Commission waives the ordinary comment period to the Revised Offer of Settlement.

these proceedings, except for certain issues conerning the appropriate rates for transmission service.

In particular, the Commission staff would withdraw its request that FP&L be required to file a transmission tariff or statement regarding the availability of transmission service. Staff also would withdraw its allegation of anticompetitive activity by FP&L. FP&L, in turn, would modify its TSAs to provide that it may not unilaterally terminate them without good reason on at least two years notice. In addition, if the Commission approves the Revised Offer of Settlement, FP&L will undertake to file with the Former Fifth Circuit a motion to vacate its judgment in *Florida Power & Light Company v. F.E.R.C.*, 660 F.2d 668 (5th Cir., 1981), on the ground that the underlying controversy is moot. Unlike the April Offer of Settlement, the Revised Offer does not appear to be contingent on the Commission's active support of such a motion. The absence of such a contingency resolves one of the difficulties which the Commission had with FP&L's April Offer of Settlement.

The other principal concern which the Commission had with the April Offer of Settlement is addressed and resolved by FP&L in its Memorandum in Support of the Revised Offer of Settlement. That concern had to do with the possibility of rate terms in the unfiled March settlement which should be filed under section 205(c) of the Federal Power Act. At page 3 of its Memorandum, FP&L has formally notified the Commission of those likely rate terms[4] and has provided assurances that as contracts embodying the terms are executed with individual cities, the filing requirements of the Commission's regulations will be met. That being the case, the Commission sees no need to hold up its approval of the Revised Offer of Settlement.

---

[4]These rate terms provide for:

(a) Renegotiation of transmission service agreements for interchange transactions to provide for pricing of service on a per kilowatt hour basis, subject to certain conditions,

(b) Options for the CIties to contract, by certain dates, for service that would utilize 500 kV facilities that FP&L proposes to construct, and

(c) The parties cooperation in a study by the Florida Electric Power Coordinating Group of alternative means of providing transmission service in Florida.

The Commission finds that the Revised Offer of Settlement appears to be fair, reasonable and in the public interest. The Commission, therefore, will approve and adopt the Revised Offer of Settlement. The Commission's approval of this settlement shall not constitute approval of or precedent regarding any principle or issue in this proceeding.

The Commission orders:

(A) The Revised Offer of Settlement submitted by FP&L is approved and adopted.

(B) The dismissal from this proceeding of all issues and requests for relief concerning (1) alleged anticompetitive activity by FP&L, (2) any obligation on the part of FP&L to file a transmission tariff or otherwise provide transmission service pursuant to a policy of general availability, or (3) any obligation on the part of FP&L to file a statement or statements concerning or the circumstances under which FP&L is willing to provide transmission services.

(C) The Initial Decisions in Dockets ER77-175-000 and ER78-19-000 are vacated to the extent that they concern any of the issues or requests for relief described in paragraph (B), including vacation of Items I(a) and I(b) 1 and 5 of the Initial Decision in Docket No. ER78-19-000, issued July 24, 1980. The Initial Decisions in these dockets, insofar as they relate to such issues and requests for relief, shall have no force, effect, or precedential value.

(D) The Commission's Orders of December 21, 1979, and February 6, 1980, in Docket Nos. ER78-19-000, *et al.* and of July 22, 1980, in Docket Nos. ER78-411, *et al.* are vacated, and all other orders concerning the provision of transmission services by FP&L are vacated insofar as they require the provision of such services pursuant to a tariff on the ground that the controversy that underlies those orders is moot as a result of settlement.

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE FORMER FIFTH CIRCUIT

Florida Power & Light Company, Plaintiff	)	
v.	)	Nos. 80-5259
Federal Energy Regulatory Commission, Respondent	)	80-5922

STATEMENT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission agrees with the Florida Power & Light Company and Florida Cities, Intervenors, that the underlying controversy in these dockets is moot.

Respectfully submitted,
JEROME M. FEIT

Jerome M. Feit
Solicitor
[Robert F. Shapiro]

Robert F. Shapiro
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
202-357-8440
June 17, 1982

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing by mailing copies to counsel listed below:

FLORIDA POWER & LIGHT COMPANY

Floyd Norton, Esquire
Reid & Priest
1111 19th Street, N.W.
Washington, D.C. 20036

THE UTILITIES COMMISSION OF NEW SMYRNA BEACH, THE FT. PIERCE UTILITIES AUTHORITY OF THE CITY OF FT. PIERCE, AND THE CITY OF HOMESTEAD, AND STARKE, FLORIDA

Robert A. Jablon, Esquire
Daniel Guttman, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Robert F. Shapiro

Robert F. Shapiro
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
202-357-8440
June 17, 1982

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5922

FLORIDA POWER AND LIGHT COMPANY

versus

FEDERAL ENERGY REGULATORY COMMISSION

Petition for Review of an Order of the
Federal Energy Regulatory Commission

[Filed June 28, 1982]

ORDER:

It is ORDERED that petitioner's motion to dismiss is GRANTED, all parties having agreed that the case has become MOOT.

/s/ PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

APPENDIX R

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-5259

FLORIDA POWER AND LIGHT COMPANY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

Petition for Review of an Order of the
Federal Energy Regulatory Commission

[Filed August 16, 1982]

ORDER:

IT IS ORDERED that Potomac Electric Power Company's motion for leave to file out of time a motion for leave to intervene is Denied.

IT IS FURTHER ORDERED that Potomac Electric Power Company's motion for leave to intervene is Denied.

IT IS FURTHER ORDERED that Potomac Electric Power Company's motion for leave to respond out of time is Denied.

UNITED STATES CIRCUIT JUDGE
R. Lanier Anderson, III

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452 October 14, 1980.

APPENDIX S

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
August 16, 1982

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 80-5259
FLORIDA POWER AND LIGHT CO. -vs- FEDERAL ENERGY REGULATORY COMMISSION
(FERC NOS. ER 78-19, et al.)

The following action has been taken in the above case:

☐ AN EXTENSION OF TIME has been granted to and including

☐ for filing appellant's/petitioner's brief.
☐ for filing appellee's/respondent's brief.
☐ for filing reply brief
☐ for filing petition for rehearing
☐ Motion to consolidate granted
☐ Motion to supplement or correct the record granted.
☐ Motion for leave to file supplemental brief granted
☐ Motion for leave to file brief *amicus curiae* is granted.
☐ Joint motion as to time for filing briefs granted.
■ Order enclosed has been entered

NORMAN E. ZOLLER, Clerk

By: Henrietta Barnes
Deputy Clerk

cc:
Robert T. Hall, III, Esquire
Richard M. Merriman, Esquire
Floyd L. Norton, IV, Esquire
Harry A. Poth, Jr., Esquire
Robert A. Jablon, Esquire
Frank A. Kreidler, Esquire
Jerome M. Feit, Esquire
Robert F. Shapiro, Esquire
Edward A. Caine, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-5259

FLORIDA POWER AND LIGHT COMPANY

versus

FEDERAL ENERGY REGULATORY COMMISSION

Petition for Review of an Order of the
Federal Energy Regulatory Commission

[Filed August 16, 1982]

ORDER:

IT IS ORDERED that petitioner's motion to vacate as moot the court's judgment in Florida Power and Light Company is Denied.

/s/ R. Lanier Anderson, III
R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1980)

Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-822

In the Supreme Court of the United States

OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

Petitioners contend that the court of appeals erred in denying a motion to vacate its judgment as moot following settlement of the dispute underlying the judgment, where the settlement was entered into with the approval of the Commission before the time for seeking review of the judgment had expired.

1. In November 1979, the Federal Energy Regulatory Commission ordered Florida Power & Light Company (FP&L) to file a tariff setting forth FP&L's policy regarding the availability of electric transmission service to certain Florida municipal utilities (Pet. App. A-1 to A-9). Following the Commission's denial of FP&L's application for rehearing (Pet.

App. A-10 to A-12), FP&L sought review of the Commission's order in the court of appeals. The court reversed the Commission (Pet. App. A-24 to A-45; 660 F.2d 668), concluding that the Commission lacked authority to order FP&L to file the tariff containing the policy statement. The mandate of the court of appeals was issued on February 3, 1982 (Pet. App. A-54).

In March 1982, FP&L and petitioners entered into a comprehensive settlement of their legal differences (Pet. App. A-79). This settlement was reached after the court of appeals' decision reversing the Commission's order, but before expiration of the time for filing a petition for a writ of certiorari with this Court to review that decision. Part of the settlement was an agreement to seek, with the consent of the Commission, vacation of the judgment of the court of appeals on the ground that the controversy was moot (*id.* at A-60).

FP&L and petitioners subsequently entered into negotiations with the Commission's staff, which culminated in an uncontested settlement agreement. This agreement was approved by the Commission in June 1982 (Pet. App. A-76 to A-81). The Commission noted that "if the Commission approves the Revised Offer of Settlement, FP&L will undertake to file with the Former Fifth Circuit a motion to vacate its judgment in *Florida Power & Light Company* v. *F.E.R.C.*, 660 F.2d 668 (5th Cir., 1981), on the ground that the underlying controversy is moot" (Pet. App. A-80). In addition, the Commission recognized the need to act on the settlement before the expiration of the time for filing a petition for a writ of certiorari (*id.* at A-79).

On June 17, 1982, prior to the expiration of the time for filing a petition for a writ of certiorari to

review the decision of the court of appeals, FP&L and petitioners filed a motion requesting the court of appeals to vacate its judgment. The Commission took no position on the motion. However, it filed the following statement with the court (Pet. App. A-82):

> The Federal Energy Regulatory Commission agrees with the Florida Power & Light Company and Florida Cities, Intervenors, that the underlying controversy in these dockets is moot.

The court of appeals denied the motion to vacate without explanation (*id.* at A-88).

2. This Court has stated that "'[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.'" *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979), quoting *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (emphasis added by the Court). The decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (footnote omitted), similarly makes clear that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." This practice serves "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

Here, however, the motion to vacate judgment on mootness grounds was filed with the court of appeals after that court had issued its mandate. In these circumstances, it is questionable whether the court below was under any obligation to recall its mandate in

order to act favorably on the motion to vacate. Although the Commission, consistent with its stance in the court of appeals, takes no position with respect to the proper disposition of the petition for a writ of certiorari, the Solicitor General does not believe that this case presents any issue warranting the exercise of this Court's certiorari jurisdiction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 394692 1214

Office - Supreme Court, U.S.
FILED
DEC 2 1982
ALEXANDER L. STEVAS,
CLERK

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Former Fifth Circuit

RESPONSE OF FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF FLORIDA CITIES' PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Writ Of Certiorari To The United States Court Of Appeals For The Former Fifth Circuit

---

RESPONSE OF FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF FLORIDA CITIES' PETITION

On November 6, 1981 the Former Fifth Circuit issued a decision in *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668. Rehearing applications by the respondent Federal Energy Regulatory Commission ("Commission") and intervenor Florida Cities[1] and a Suggestion for Rehearing En Banc by Florida Cities were denied on January 22, 1982. During the time in which Florida Cities could have petitioned for a writ of *certiorari*, Florida Power & Light Company ("FPL")[2] and Florida Cities reached a settle-

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[1] Florida Cities are the Cities of Gainesville, Homestead, Starke, Key West, Kissimmee, St. Cloud, Tallahassee, the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission.

[2] FPL's subsidiaries are listed in Petitioner's Brief at p. ii, n.1.

ment of their differences, and, on June 17, 1982, the Commission approved a settlement of the Commission proceedings that had resulted in the proceedings before the Fifth Circuit. As part of these settlements, FPL agreed to seek vacation of the judgment of the Former Fifth Circuit on the ground that the underlying controversy has been rendered moot by settlement. FPL joined Florida Cities in a Motion dated June 17, 1982, which requested the Former Fifth Circuit to vacate its judgment on the ground that the underlying controversy was moot, relying on the doctrine of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The Commission, in a pleading filed on the same date, confirmed to the Former Fifth Circuit the mootness of the controversy. However, the Former Fifth Circuit denied this Motion on August 16, 1982. Florida Cities therefore have petitioned this Court for a writ of *certiorari* to reverse the action of the Former Fifth Circuit denying the motion to vacate. FPL supports Florida Cities' petition.

FPL's support of Florida Cities' petition is based solely on the *Munsingwear* doctrine, which has been adopted by the Fifth Circuit, *see, e.g.*, *Tyson* v. *Cazes*, 363 F.2d 742, 744 (5th Cir. 1966), and which holds that when a controversy has been mooted by settlement before the time for seeking review has expired, the judgment of the lower court should be vacated and the case dismissed. Vacating the decision on the grounds of mootness does not imply approval or disapproval of the substance of the Former Fifth Circuit's decision. *St. Louis-San Francisco Ry. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 347 F.2d 983, 984 (5th Cir. 1965). The policy underlying the *Munsingwear* doctrine is that a party that foregoes its right to seek review of a decision because of a settlement should not be bound by the unreviewed decision. That

policy appears to be applicable to this case, and, accordingly, FPL submits that the Florida Cities' petition for writ of certiorari is meritorious.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 10 1983
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FOR THE FORMER FIFTH CIRCUIT

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REPLY BRIEF OF PETITIONERS

Petitioners, Florida Cities, have requested that this Court grant certiorari and overturn the Former Fifth Circuit's denial of a motion to vacate as moot a case below that had been settled by all parties. Under United States v. Munsingwear, Inc., 340

U.S. 36, 39-40 (1950) quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936), it is "the duty of the appellate court" to vacate a judgment which has become moot as a result of settlement before judicial review is complete.

The FERC agrees "that the underlying controversy in these dockets is moot." (Pet. App., A-82); FERC Memorandum, pp. 3, 4. However, the Solicitor General suggests that the fact that the Former Fifth Circuit had already issued its mandate when the parties moved to vacate may have removed its "obligation to recall its mandate in order to act favorably on the motion to vacate." Id., pp. 3-4.

In an amicus pleading, the Potomac Electric Power Company ("PEPCO") states that the Former Fifth Circuit acted correctly in refusing to vacate, contending that once the mandate below had issued, petitioners' remedy

to obtain vacation of the case below was to "have moved this Court [to] vacate the appellate court's decision within the time permitted for a petition for a writ of certiorari." PEPCO Brief, pp. 6-7.

I. PRESERVATION OF THIS COURT'S RESOURCES AND PROPER JUDICIAL PROCESS DICTATE THAT MOTIONS TO VACATE BE FILED WITH THE COURTS BELOW SUBJECT TO THIS COURT'S CERTIORARI REVIEW

Florida Cities' and FPL's Motion to Vacate the judgment in Flordia Power & Light Company v. Federal Energy Regulatory Commission, 660 F.2d 668 (5th Cir. 1981) was properly filed with the Former Fifth Circuit rather than before this Court. In Munsingwear itself, the Court refused to order vacation because such motion had not been made in the court below:

> In this case the [petitioner] United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

> Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one. See 28 U.S.C. §2106, 62 Stat. 963; United States v. Hamburg-American Co., 239 U.S. 466, 478 [1916]; Walling v. Reuter Co., 321 U.S. 671, 676-677 [1944] ...
>
> The case is therefore one where the [petitioner] United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself.

340 U.S. at 40-41. Far from committing procedural error, the parties were required to seek relief in the Former Fifth Circuit before coming here.

The alternative policy argued for by PEPCO would require parties to petition for certiorari on the merits and then move to vacate in this Court. Such requirement could only needlessly add to the workload of the Supreme Court without creating any offsetting benefit. Perhaps more realistically, it would vitiate the Munsingwear doctrine because the Court would not have the time to examine numerous Munsingwear petitions that

could be resolved by the District Courts, Courts of Appeals and agencies below. The further suggestion that it should be necessary for parties who have settled to file petitions for certiorari on the merits is ludicrous. Settlements are entered into to avoid further litigation. 1/

Florida Power & Light Company, petitioner below, and Florida Cities jointly moved that the Former Fifth Circuit vacate its judgment before the time for the filing of a writ of certiorari had run. Absent the settlement of the case, Florida Cities would have filed for

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1/ Florida Cities requested an extension of time to file for certiorari with this Court to permit Federal Energy Regulatory Commission action "in light of the parties' settlement." (Pet. App., A-69, A-71) They did so in specific contemplation that they "would move the Fifth Circuit to vacate its judgment on the ground that the underlying controversy among the parties is moot" and told the Court that the grant of the motion for a time extension "would obviate any need for any party to apply for a writ of certiorari." (Pet. App., A-71)

certiorari on the merits. Acceptance of the arguments of PEPCO could only discourage parties from settling cases. Under PEPCO's theory, parties would no longer have the incentive to enter into a settlement because the very act of settling would make decisions in cases pending appeal binding. Further, as stated above, legal doctrine would become distorted because precedent would be established not as a result of final determinations of cases or controversies but because of the "happenstance" of settlements which preclude parties' further pursuit of their appellate rights. Munsingwear, supra, 340 U.S. at 40.

The Solicitor General and PEPCO suggest that the crucial point is that the mandate of the Former Fifth Circuit had issued at the

time of settlement, although the time in which to petition for certiorari had not yet run. 1/

Rule 41(a) of the Federal Rules of Appellate Procedure provides that unless accelerated or stayed by specific court order, mandates issue automatically 21 days after the entry of judgment. Thus, when cases are settled after decisions below, but before the time for the filing of appeals

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1/ In their Petition for a Writ of Certiorari, Florida Cities state (p. i) that "this case presents no novel question," but that "[t]he failure of the Former Fifth Circuit to comply with applicable precedent of this Court is so clear" that "summary reversal is appropriate in order to protect the integrity of the judicial process." Counsel adheres to this view. In Munsingwear, supra, 340 U.S. at 40, the Supreme Court stressed: "Denial of a motion to vacate could bring the case here." See full quotation at pp. 3-4, supra. However, if the Solicitor General is correct that there is an issue (i.e., the impact of the Former Fifth Circuit's issuance of its mandate under Munsingwear), then this case is worthy of consideration by this Court. Absent clarification, parties and the bar will not know the legal impact of settlements -- or would-be settlements -- pending appeal.

lapses, mandates will often have issued. Contrary to the implications of PEPCO (Brief, pp. 4-6), a court's mandate will normally be stayed due to the filing of a timely rehearing application and can always be recalled to prevent injustice. Fed. R. App. P. 41; 5th Cir. R. 17; Wilkins v. United States, 441 U.S. 468 (1979); Ferrell v. Estelle, 573 F.2d 867, 868, withdrawing opinion, 568 F.2d 1128 (5th Cir. 1978); Savage v. United States, 483 F.2d 67 (5th Cir. 1973), cert. denied, 415 U.S. 949 (1974); Lacaze v. United States, 457 F.2d 1075 (5th Cir.), cert. denied, 409 U.S. 921 (1972); Gradsky v. United States, 376 F.2d 993, 995 (5th Cir. 1967), vacated on other grounds sub nom. Roberts v. United States, 389 U.S. 18, cert. denied, 389 U.S. 908 (1967). Thus, it is beyond question that the Former Fifth Circuit could have granted the parties' motion to vacate as moot, even though the

grant of such motion would have technically involved the recall of its mandate. This is the natural implication of the Munsingwear doctrine.

As the Former Fifth Circuit stated in Dickerson v. Continental Oil Co., 476 F.2d 635, 636 (5th Cir. 1973) (footnote omitted):

> Since terms, as such, no longer exist, this Court has the innate power to recall and then relax its mandate on a proper showing. Meredith v. Fair, 5 Cir., 1962, 306 F.2d 374. The more orderly way is, of course, for the party affected to formally petition this Court .... But in a structure of rules which at every stage envisages the attainment of substantial justice with a minimum of technicalities, there is no insurmountable need for such a formal motion. We can, and as we have before, Bros Inc. v. Davidson, 5 Cir., 1964, 330 F.2d 65, 67, we treat the present appeal as in effect, a post-judgment-post-mandate request.

Accord, National Surety Corp. v. Charles Carter & Co., Inc., 621 F.2d 739, 741 (5th Cir. 1980). 1/ See Cahill v. New York, N.H.

1/ To the extent that PEPCO implies a finality argument, see cases such as United

FOOTNOTE CONTINUED ON NEXT PAGE

& H.R. Co., 351 U.S. 183 (1956).

Here, FPL and Florida Cities filed for vacation of the Former Fifth Circuit's judgment under Munsingwear. If such motion was not sufficient, then the Munsingwear doctrine must be overturned or limited insofar as it directs that motions to vacate be filed with the lower courts. Mandates will often have issued where settlement takes place during the appellate process, but before appeal rights are exhausted. PEPCO itself quotes language from Munsingwear Brief, p. 4), establishing that the vacation due to mootness principle applies not only to a case pending Supreme Court decision on the merits

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

States v. Ohio Power Co., 353 U.S. 98, 99 (1957), Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965), and Cahill v. New York, N.H. & H.R. Co., 351 U.S. 183 (1956). These cases establish that the Fifth Circuit was not at liberty to place the interests of finality ahead of other recognized interests.

but also to a case "on its way" to the Supreme Court. Thus, under Munsingwear, supra, the parties had a right to file for vacation and could do so only in the Former Fifth Circuit which, if such motion were properly filed, had the "duty" to grant it. Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979), quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936) (emphasis added by the Court). See also University of Texas System v. Assaf, 435 U.S. 992 (1978), vacating, 557 F.2d 822 (5th Cir. 1977); Board of Regents of the University of Texas System v. New Left Education Project, 414 U.S. 807 (1973), vacating, 472 F.2d 218 (5th Cir. 1973). Compare FERC Memorandum, p. 3.

II. PEPCO'S MOTION FOR LEAVE TO PARTICIPATE AS AMICUS SHOULD BE DENIED

PEPCO asserts a right to participate as amicus. To the extent that it could have

shown a substantive interest in the case below, it could have participated before the FERC or the Court of Appeals on the merits. In fact, it had no such interest. Nor did it ever seek intervention on the merits.

PEPCO's position here illustrates the underlying reason for the Munsingwear doctrine: precedent should not be set based upon cases which have been settled by the parties at interest. PEPCO's approach would result in underlying decisions which stand not as a result of final adjudications, but as a result of parties' failure to appeal because of the fortuity of a settlement. Munsingwear, supra.

As stated, PEPCO neither participated nor had an interest in the case below. The underlying dispute concerned transmission of electricity between and among Florida utilities. PEPCO operates in the Washington, D. C. area, and does not buy, sell or

transmit power in Florida. It had no standing to be a party under the Federal Power Act. That statute provides, "any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order ...", Federal Power Act, Section 313(b), 16 U.S.C. §8251(b) (emphasis added). Nor does it have standing under the Administrative Procedure Act, 5 U.S.C. §701 et seq., or under any other relevant legal authority.

A basic premise of American jurisprudence is that the Court is not a legislature. Jurisdiction is based upon "cases" or "controversies". "[J]udicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Muskrat v. United States, 219 U.S. 346, 361 (1911) (emphasis added). PEPCO's interest is no greater than that of any other citizen or

company. Such a general, "purely public" interest is not enough to sustain intervention. Sierra Club v. Morton, 405 U.S. 727 (1972). PEPCO makes plain that its desire to participate here is merely because of its asserted "substantial interest" in the precedent of the holding below. (Motion, p. ii; Brief, p. 2) But while the public at large has an abstract interest in any given case precedent, that interest does not give rise to a right to sue. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). In short, PEPCO's desire to "rel[y]" (Brief, p. 2) upon the Former Fifth Circuit's decision cannot be divorced from the proceedings below in which it had no interest and which the parties had settled.

While PEPCO would obviously like to provide a rationale for the Fifth Circuit's denial of the Motion to Vacate, which that

Court itself did not provide, its participation cannot add substance to the Court of Appeals' cursory denial of the Motion to Vacate (Pet. App., A-88). The Former Fifth Circuit correctly denied PEPCO the right to participate on the question of vacation due to mootness (Pet. App., A-85) after hearing similar arguments to those which PEPCO makes here.

Respectfully submitted,

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